111-276

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 261.

HENRY M. RECTOR, APPELLANT,

vs.

E. Q. GIBBON ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED JULY 11, 1881.

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1 Be it remembered that on the 30th day of September, 1880, came into the office of the clerk of the Circuit Court for the eastern district of Arkansas E. Q. Gibben and other defendants, by John M. Harrell and Clark and Williams, esqs., their solicitors, and filed therein on the chancery side of said court a transcript from the Garland county Circuit Court, which transcript is as follows:

HENRY M. RECTOR
v.
E. Q. GIBBEN, DAVID KIRKPATRICK, HENRY A. BALLENTINE, JAMES M. BALLENTINE, HENRY A. LAWRENCE, HARRIETT E. CONNALLY, ORREN MCCRACKEN, FRANK B. MCCRACKEN, EDWARD C. LAURENCE, as administrator of the estate of David Ballentine, deceased, and HENRY M. RECTOR, jr.
August term, 1880.

Be it remembered that at a regular term of the Circuit Court of Garland county, Arkansas, which was begun and held at the city hall in the city of Hot Springs, said county and state, the
2 temporary court-house for Garland county, on Monday, the 2nd day of August, 1880, said day being the time prescribed by law for holding a term of said court, there was present and presiding by virtue of the following agreement:

(*Exchange of Circuits.*

This agreement made this 22 day of July, 1880, by and between Jesse N. Cypert as judge of the first judicial circuit of the state of Arkansas and Jabez M. Smith as judge of the 7th judicial circuit of said state, witnesseth, that said parties as such judges agree to and do hereby exchange their said judicial circuits for the time or term following, to wit:

To commence on this 22nd day of July, A. D. 1880, and to continue up to and include the next term thereafter of the Circuit Court of Prairie county and of Hot Springs in said state, in said year, when the said exchange is to cease and end, and during the time or terms aforesaid the said Jesse N. Cypert is to hold the next term of the Garland county Circuit Court and Hot Springs county Circuit Court at the times as prescribed by law, and the said Jabez
3 M. Smith is to hold the Circuit Courts of White county, Woodruff county, and Prairie county as prescribed by law.

In testimony whereof, we, the said Jesse N. Cypert and Jabez M. Smith, as such judges as aforesaid, have hereto set our hands this the day and year first above written.

J. N. CYPERT,
As Judge of First Judicial Circuit.
JABES M. SMITH,
As Judge of 7th Judicial Circuit of the state of Arkansas.)

Honorable Jesse N. Cypert, judge of the first judicial circuit of the state of Arkansas, when the following proceedings were had, to wit:

Ordered, that the court be proclaimed open pursuant to law; which was accordingly done by J. H. Nicholas, sheriff of Garland county.

The state of Arkansas to the sheriff of Garland county:

You are commanded to summon E. Q. Gibbon, David Kirkpatrick, Henry A. Ballentine, James M. Ballentine, Henry A. Law-
4 rence, Harriett E. Connelly, Orrin McCrackin, Frank B. McCrackin, Edward C. Lawrence, as adm. of est. of David Ballentine, and Henry Rector, jr., to answer in twenty days after the service of this summons upon them a complaint in equity, filed against them in the Garland Circuit Court by Henry M. Rector, and warn them that upon their failure to answer the complaint will be taken for confessed; and you will make due return of this summons on the 1st day of the next August term of said court.

Witness my hand and the seal of said court this 12th day of July, 1880.

[SEAL.] J. H. LAW, *Clerk.*

HENRY M. RECTOR
vs.
E. Q. GIBBON et al.

STATE OF ARKANSAS,
County of Garland, } *ss.*

I have this 13 day of July, 1880, duly served the within by delivering a true copy of the same to the within named E. Q. Gibbon, Henry A. Ballentine and Henry M. Rector, jr., as therein commanded.

Fees.—Service, 1.50; mileage, .10; return, 25—1.85.

5 J. H. NICHOLS,
Sheriff.

Returned and filed this 14 day of July, A. D. 1880.

J. H. LAW, *Clerk.*

Garland Circuit Court.

HENRY M. RECTOR
vs.
EDWIN Q. GIBBON, DAVID KIRKPATRICK, HENRY A. BALLENTINE, JAMES M. BALLENTINE, HENRY A. LAWRENCE, HARRIET E. CONNOLLY, ORRIN MCCRACKEN, FRANK B. MCCRACKEN, EDWARD C. LAWRENCE, as administrator of the estate of DAVID BALLENTINE, dec'd, and HENRY M. RECTOR, jr.

The said plaintiff brings this suit against the said defendant, and for cause of action says:

That about the year 1839 he entered into possession of a certain

tract of land lying in the county of Garland and state of Arkansas, described as follows:

6 Beginning at post from which a pine ten inches in diameter, marked "H and R," bore south 47 degrees east 8 links; thence south 7 chains a creek 15 links wide runs east at 41 chains and 25 links, set a post, from which a pine 15 inches in diameter bore north forty-seven and a half degrees east 23 links; thence east 19 chains 25 links to Hot Springs creek, 25 links wide, runs south; at 41 chains and 25 links set a post, from which a post oak 18 inches in diameter bore south 86 degrees 6 links; thence north at 41 chains and 25 links set a post, from which a red-oak 6 inches in diameter bore south 62 degrees west 16 links; thence west 41 chains and 24 links to the beginning.

That he remained in the exclusive possession of that part of said tract which will be hereinafter described from the year last aforesaid until the first day of June, in the year 1876, when he was dispossessed thereof by a receiver appointed by the Court of Claims of the United States, under an act of Congress entitled "An act in relation to the Hot Springs reservation in Arkansas, of June 11, 1877.

7 That the plaintiff entered into such possession under a location of a *a* New Madrid claim which had been located on said land, and so held the same until it was decided by the Supreme Court of the United States, in the year 1875, that the said claim was invalid by reason of an informality in the proceedings relating to the location thereof; his possession being subject to that of said receiver after his appointment as aforesaid.

That on the 21st day of February, 1873, the land hereinafter named, being a part of the tract above mentioned, was in the hands of Henry M. Rector, jr., a son of the plaintiff, as trustee for the purpose of paying certain debts, and that the said trustee, having full power so to do, on that day made a lease "of a certain lot of land situate on the west side of Hot Springs creek, formerly occupied by the Akin House and the Valley House, and all the ground that intervened between said houses, and all the ground running one hundred feet back from the rear of the Akin House and from the rear of the Valley House, for the purpose of a hotel, bath-house,

8 and out-houses and appurtenances, at the annual rent of five hundred dollars a year, and fifteen hundred dollars a year for water privileges, for and during the term of three years and three months, beginning on the 21st day of February, 1873, and ending on the 21st day of May, 1876, with the proviso that the land so leased should be held by said lessee for the first three months of the term free of rent, $133.33 of said rent to be paid on the 21st day of September, 1873, and the remainder to be paid in monthly instalments in advance.

That it was further provided in said lease that the said hotel and other improvements mentioned therein should not cost more than twelve thousand dollars and that the bath-house should only be used by the guests of the hotel; and that at the end of the term the lessor

should have a right to take said improvements by paying two-thirds of the first cost thereof, and should take the furniture in said hotel and bath-house by paying its actual value, so that the same should not exceed eight thousand dollars; and that if the lessor should
9 not pay the said amounts at the end of the term, then the term should be extended on the same terms named in said lease until the lessor should make such payments, giving ninety days' notice of his intention to terminate the lease; the lessee having a right to under-let or to assign the said term only by consent of the lessor.

The said lease also contained the following provision:

"The said Gibbon and Kirkpatrick, parties of the second part, hereby agree with Rector, party of the first part, that upon the termination of this lease, upon the terms hereinbefore specified and set forth, will deliver to said Rector, party of the first part, or to his successors in office, or grantees, or to whomsoever at that time in law may have the right to control said trust property, all the lands that are hereinbefore leased or demised to the parties of the second part by said party of the first part promptly, without failure, and free from let or hindrance of any kind whatever; together with all the buildings, out-houses, and improvements that may be erected on said premises."

10 It was also provided by said lease that if said hotel should be burned, then the lease should end. Which lease was duly acknowledged and filed for record in the office of the recorder of said county on the 23d day of June, 1873, as will appear by reference to a copy of the same herewith filed, marked Exhibit A, and made part hereof.

That the said firm of E. Q. Gibbon & Co. was composed of Edwin Q. Gibbon and David Kirkpatrick.

That soon after the date of said lease, and during said term, the said trusts for which said property was held by said Henry M. Rector, jr., were discharged by the payment of said debts, and the said property and the possession thereof, subject to any paramount title that might be in the United States, reverted to the plaintiff.

That before said lease was made the plaintiff had made certain improvements on said premises of the value of at least one thousand dollars, in excavations, grading, and building a wall to protect the land from the action of the stream bounding the same, and known as "Hot Springs creek," besides erecting valuable buildings
11 and other improvements thereon.

That after said lease was made a hotel was built on the premises, called "The Grand Central Hotel;" that a short time before the end of said term it was agreed between the plaintiff, said trustee and said lessees, that the said lease should be continued until some time in the future when it might be terminated by the written notice as provided in said lease. That in the year 1877 said lessees sold and transferred to one David Ballentine all their right and claim to said premises, he well knowing before said transfer all the terms

and conditions of said lease; which transfer was made without the knowledge or consent of the plaintiff.

That while said E. Q. Gibbon & Co. were in possession of said premises, and before said transfer, plaintiff gave notice to them, required by said lease, of his intention and desire to terminate said lease, and requested them to furnish him with a list of the furniture coming within its provisions, which they promised to do but never in fact did; so that plaintiff never could get from them the information that was necessary for a basis of settlement with them;

12 and so no settlement was ever made, though the plaintiff was always ready and willing and frequently offered to pay to said lessees all sums that might be due them under the terms of said lease; which offer they always declined under various pretences to receive.

That after entering upon said premises by virtue solely of the said transfer from said lessees, said David Ballentine died resident of the state of Illinois, leaving him as surviving his children and only heirs at law, Henry A. Ballentine, James M. Ballentine, Mary A. Lawrence, Harriet E. Connolly and Jane McCracken, the last of whom has since died, leaving her surviving her husband, Orren McCracken, and her only child and heir at law, Frank B. McCracken. Said David also left him surviving his widow, Agnes Ballentine; and that Edward F. Lawrence has since qualified as administrator of his estate in the state of Illinois, in due form of law, and is now engaged in discharging the duties of that office.

That soon after the passage of the act of Congress entitled

13 "An act in relation to the Hot Springs reservation in the state of Arkansas," approved March 3d, 1877, and the appointment and qualification of the commissioners therein provided for, they caused the said premises that were leased as above stated to be surveyed, to be laid off into convenient squares, blocks, lots, avenues, streets and alleys, and a map of the same to be made, and that by said survey and map the premises leased as aforesaid are now known and described as lots five, six, seven, eight, nine, ten and eleven in block eighty-nine in the town of Hot Springs in said county, and that a part of said premises were laid off into a street, and that on said street was situated the "Grand Central Hotel" proper and some of the out-buildings connected therewith; and that said commissioners gave to the heirs of said Ballentine a certificate showing that the said hotel and other buildings in said street had been condemned and that they were of the value of ten thousand dollars, and they were accordingly torn down and destroyed by them.

14 That in less than six calendar months after the first sitting of said board of commissioners the plaintiff filed his claim before them to purchase said lots, and that the heirs of said David Ballentine filed a like claim, and that on a hearing of these matters before said commissioners they awarded the right to purchase said lots to the said heirs, although it was fully shown to them that the

said David, their ancestor, had acquired his possession thereof in no other way but by said lease made by the plaintiff to said E. Q. Gibbon & Co.

And as the defendants have never had any other right or title to said lots, or to the possession thereof, than that which they derived from said lease, and under covenants to restore such possession to the trustee or his successor in title, the plaintiff submits that they should be held to hold said lots as trustees for the use and benefit of himself.

The plaintiff offers to pay any sum that may be found to
15 be due to the defendants, or either of them, by reason of any money they may pay out for the purchase of said lands, and to do all other acts which may be found to be just and equitable.

And they pray that an account may be taken of the state of accounts between himself and said defendants severally; that he may be allowed reasonable rents for the occupancy of the said premises; that the defendants may be decreed to hold said lots as trustees for the plaintiff, and to convey the same to the plaintiff, and that he may have such other relief as may be equitable.

F. W. COMPTON.
U. M. ROSE.

I, H. M. Rector, say that I believe the statements made in the foregoing complaint to be true, and that the defendants, David Kirkpatrick, James M. Ballentine, Henry A. Lawrence, Harriet E. Connally, Orrin McCracken, Frank B. McCracken, Edward Lawrence, are non-residents of the state of Arkansas.

H. M. RECTOR.

16 Sworn to and subscribed before me July 5th, 1880.

DUNBAR H. POPE,
Notary Public.

STATE OF ARKANSAS, }
County of Garland. }

I, Henry M. Rector, the plaintiff in this suit, state that David Kirkpatrick and James M. Ballentine.

H. M. RECTOR.

Subscribed and sworn to before me this 12th day of July, 1880.

J. H. LAW, *Clerk.*

Exhibit A to Complaint.

STATE OF ARKANSAS, }
County of Hot Springs, } *sct.*

This contract of lease, made and entered into this 21st day of February, A. D. 1873, by and between Henry M. Rector, jr., trustee, of the county of Hot Springs and state of Arkansas, the party of the

first part, and Edwin Q. Gibbon, of the county of Pulaski and
17 state of Arkansas, and David Kirkpatrick, of the county of
Golo and state of California, the parties of the second part, trading and doing business under the firm name and style of E. Q. Gibbon & Co., witnesseth: That the said party of the first part, for and in consideration of the covenants, conditions, reservations, limitations, and considerations hereinafter expressed, doth hereby demise, grant, and let unto the said parties of the second part, their executors and administrators, a certain lot of ground situate in Hot Springs valley, in Hot Springs county, in the state of Arkansas, to wit, that certain lot of land situate on the west side of Hot Spring creek, formerly occupied by the "Akin House" and the "Valley House," and all the ground that intervened between said houses, and all the ground running one hundred feet back from the rear of "Akin House" and from the rear of "Valley House," for the purposes of a hotel, bath-house, out-houses and appurtenances, at the rate of five hundred dollars per annum, together
18 with a water privilege at the rate of fifteen hundred dollars per annum, to wit, sufficient hot water of proper quality and elevation, furnished from the Hot Springs of Ark., to supply and run the bath-house aforesaid, which shall contain not exceeding ten tubs and ten vapors, to have and to hold, to use and to enjoy said lot of land and water privilege unto them, the parties of the second part, their executors and administrators, for and during the term of three years and three months, to wit, from the 21st day of February, A. D. 1873, to the 21st day of May, A. D. 1875, with this express agreement, qualification, and provision, that the party of the first part shall in no wise be entitled to demand or receive any rent-money whatever on account of the first three months of said term, upon the hypothesis that the land and water privilege aforesaid will be of no value to the parties of the second part prior to the expiration of the three months aforesaid, and that their hotel and other improvements will not be completed before said time; and it is expressly understood and agreed and pro-
19 vided that the entire rent-money demandable on account of the aforesaid lease of three years and three months shall in the aggregate amount to six thousand dollars, payable as follows, to wit: seven hundred dollars cash in hand, one hundred and thirty-three dollars and thirty-three and one-third cents on the 21st day of September, A. D. 1873, and the remaining five thousand one hundred and sixty-six dollars and sixty-six cents and two-thirds cents in thirty-one equal installments, monthly in advance.

And it is understood and agreed between the parties to this contract of lease that the said hotel, bath-house, out-houses, and appurtenances, to be erected by the parties of the second part on said leased premises, shall not cost exceeding the sum of twelve thousand dollars, and that said bath-house shall be used only by the guests lodging in said hotel and such servants as may be employed about the same, and shall in no instance be opened to public patronage.

At the expiration of the term of three years and three
20 months from the date of this lease the party of the first part shall have the right of taking said hotel, bath-house, out-house, and all other improvements then standing on said leased premises, by paying two-thirds of the prime cost thereof, (provided, however, in no instance shall said party of the first part be required to pay sixty-six and two-thirds per cent. on more than twelve thousand dollars of improvements, notwithstanding said parties of the second part may have erected on said premises exceeding that amount, which they may do if they wish, free from any charge to Rector, party of the first part.)

Said parties of the second part furnishing, as they are incurred, duplicate copies of expense bills in erecting said improvements until the aggregate amount so disbursed shall equal the sum of twelve thousand dollars or less.

And the party of the first part shall also take all the furniture of every character appertaining to said hotel and bath-house, and
21 pay the actual worth and valuation price thereof to the parties of the second part at the time of taking said hotel, bath-house, out-houses, and appurtenances; provided, however, said furniture shall not exceed in first cost the sum of eight thousand dollars. The value of said furniture to be ascertained by two appraisers, one to be selected by party of the first part, and one by the parties of the second part; and in case of said appraisers so selected cannot agree in fixing a price, then they shall be at liberty to select an umpire, whereupon said appraisers shall make out a list of the furniture, etc., so to be valued and return the same as their award to said Rector, party of the first part, with their estimated value set opposite to each article contained in said inventory. And that said Gibbon and Kirkpatrick, parties of the second part, with bills of cost for all articles or furniture purchased for the purpose of furnishing said house, bath-house, etc., until the same equals the sum of eight thousand dollars or less.

22 And this it is agreed between the parties hereto shall be and is, the furniture, etc., which said Rector, party of the first part, is required to take from said parties of the second part, when he takes and pays for said improvements and furniture hereinabove referred to, provided parties of the second part may purchase and use more than eight thousand dollars' worth of furniture, the surplus continuing to be their own property, and remaining on their own hands at the end of the lease.

Nor shall said Rector be required to have appraised with said house any other furniture than that which is set forth in said bills of cost furnished by said parties of the second part to said party of the first part, as hereinbefore provided.

And it is hereby agreed between the parties hereto that the said Rector, party of the first part, when he elects to take and pay for the improvements erected upon said grounds, it is hereby made and shall

be incumbent upon him to purchase the furniture, fixtures,
23 etc., in said establishment in the quantity and at the rates hereinabove specified; but in case he declines at the expiration of the three years and three months from the date of this instrument to take and pay for said improvements and furniture, then, in that case, it is agreed between the parties hereto that this lease shall be extended upon the same rates and payments as hereinabove stipulated, until the said Rector shall be prepared and does elect to take said improvements and furniture, in which case he shall give said parties of the second part ninety days' written notice of his intention to terminate said lease.

And it is further agreed between the parties to this instrument that the said parties of the second part shall separately or jointly have the right to assign their several or joint interest in said lease and sub-let the same to any person for their own advantage. The said sub-lessee to be subject to all the conditions, reservations, limitations, and considerations herein contained, and to have the same rights herein as the said parties of the second part, and none
24 other whatsoever; provided, however, that such proposed assignee shall be made known to party of the first part, the party or parties of the second part so desirous of making such assignment shall notify the party of the first part of the name of the person to whom said assignment of this lease and sub-letting of the demised premises is proposed to be made, and the party of the first part shall have the right to accept or reject said proposed assignee, but obligates himself to offer no frivolous or unfounded objections to any person who may be proposed as such assignee.

And the party of the first part doth covenant that the said parties of the second part, on paying the rent as it becomes due and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises and water privilege for the term aforesaid without any interruption or molestation of the party of the first part, his heirs, or any other person or persons whatever, except the United States.

In addition to the water agreed to be furnished as above to
25 the bath-house, the party of the first part hereby agrees with the parties of the second part that they may insert ½-inch pipe into the tanks used for holding water, or the main water pipe, and run to kitchen to be used for culinary and washing purposes; also one of the same size to run into any part of the house for drinking and other hotel purposes.

The said Gibbon and Kirkpatrick, parties of the second part, hereby agree with Rector, party of the first part, that upon the termination of this lease upon the terms hereinbefore specified and set forth in full that they, the said parties of the second part, will deliver to said Rector, party of the first part, or to his successors in office or grantees, or to whomsoever at that time in law may have the right to control said trust property, all the lands that are hereinbefore leased or demised to said parties of the second part by said party of the first part

promptly, without failure, and free from let or hindrance of any kind whatever, together with all the buildings, outhouses, and im-
26 provements that may be erected on said premises; and the said parties of the second part further convenant with the party of the first part that first they will discharge and pay off the rent due promptly, as hereinbefore stipulated, and in default of payment said parties of the second part hereby agree to pay said Rector, party of the first part, interest at the rate of five per cent. per month (1) until the same is paid, (upon all deferred payments.)

Secondly, that they will not themselves, nor will they authorize any other person, assignee, or agent to open, appropriate, or use said bath-house for public purposes or public patronage, but only for the accommodation of the lodging guests of said hotel and the servants employed about the same. And if said parties of the second part shall divert contrary to their covenant above set forth said bath-house to public uses, then in that case all right and privileges derived under this lease shall thereby be terminated. Then said Rector, party of the first part, shall have the right to re-enter and
27 take possession of said premises, the buildings, and improvements thereon situate without let or hindrance.

And it is hereby understood, agreed, and provided between all the parties to this instrument of lease that in case the said hotel should be destroyed by fire, then said parties of the second shall no longer be bound to pay any rent-money whatever to the party of the first part under this lease or upon any contract founded hereon, and this lease itself shall in such case come to an end, and no longer bind the parties hereto, and the property thereupon shall be immediately redelivered to the possession of Rector.

The intention and proper construction of this instrument is that the furniture in the house shall be taken at its appraised value, made and ascertained at the time it is taken, as is provided in the body of the contract, irrespective of whether it is taken at the expiration of the three years and three months or at a period subsequent thereto.

28 In testimony whereof the respective parties have hereunto set their hands and affixed their seals this 21st day of February, A. D. 1873.

HENRY M. RECTOR, JR., [SEAL.]
By H. M. RECTOR, SR.,
Attorney in Fact and Agent.
E. Q. GIBBIN & CO., [SEAL.]
By KIRKPATRICK.

Attest;
W. STEDMAN.
E. F. RECTOR.

Signed in duplicate: H. M. RECTOR.

STATE OF ARKANSAS, } *sct.*
County of Garland, }

Be it remembered that on this day of September, A. D. 1877, before Thomas W. Newton, clerk of the Circuit Court in and for said county of Pulaski, personally appeared E. F. Rector, one of the subscribing witnesses to the foregoing lease, to me personally well known, who, being by me first duly sworn on her oath, stated
29 that she saw the said Henry M. Rector, as attorney in fact for Henry M. Rector, jr., lessor in said lease, subscribe and seal said lease, and that she saw said E. Q. Gibbon & Co., the lessee therein, by one Kirkpatrick, sign said lease on the day of the date thereof for the uses, purposes, and consideration therein mentioned, and that she and the said W. Stedham, the other subscribing witnesses, subscribed the same as attesting witnesses at the request of the said parties to said lease.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 4th day of September, 1877.

[SEAL.] THOMAS W. NEWTON,
Clerk.

Addenda, or Note.

HOT SPRINGS, ARK'S, *March* 19, 1873.

In consideration of the promise and agreement this day made by "E. Q. Gibbon & Co.," a party of the first part in the foregoing lease, that they will lathe and plaster the side wall of the
30 tavern house proposed in said lease to be erected, Henry M. Rector, jr., trustee, hereby agrees and consents that the limit for the construction of said improvements shall be and is hereby extended to thirteen thousand (13,000) dollars.

H. M. RECTOR, JR.,
Trustee.
By H. M. RECTOR, SR.,
Agents, and
E. Q. GIBBON & CO.

Witness:
W. J. LITTLE.

I, Ziba Beldin, county clerk and ex-officio recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 23rd day of June, A. D. 1873. And the same is now duly recorded with the acknowledgments and certificates thereon in record book "A," page 8, 9, 10, 11, 12, 13.

In witness whereof, I have hereunto set my hand and affixed the seal of said county this the 5th day of July, A. D. 1873.

[SEAL.] ZIBA BELDIN,
Clerk and ex-officio Recorder.

31 And afterwards, on Tuesday, August 3rd, 1870, the same being or subsequent adjourned day of said term, the following proceedings were had, to wit:

HENRY M. RECTOR
204.] *vs.*
E. Q. GIBBON, HENRY A. BALLENTINE et al.

Come the defendants hereto by their attorney, John M. Harrell, esq., and by leave of the court said defendants file petition and bond to remove this cause to the United States court for the eastern district of Arkansas, and asks leave for further time in which to plead, after petition is granted.

Bond.

In the Circuit Court of Garland county, Arkansas.

HENRY M. RECTOR
ags't
EDWARD F. LAWRENCE, administrator estate of DAVID BALLANTINE, deceased, et al. } No. 204.

32 Know all men by these presents that I, Edward F. Lawrence, as administrator of the goods and estate of David Ballentine, deceased, and Henry A. Ballentine, Mary B. Lawrence, Harriet B. Connolly, as principals, and M. C. O'Bryan and James Griffith as surety, are held and firmly bound unto Henry M. Rector in the sum of five hundred dollars, the payment whereof well and truly to be made unto the said Henry M. Rector, his heirs and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions:

The said Edward B. Lawrence, as administrator aforesaid, Harriet B. Connolly and Henry A. Ballentine et als, having petitioned the Garland Circuit Court of the state of Arkansas for the removal of a certain cause therein pending, wherein Henry M. Rector as plaintiff and Edward Z. Gibbin, David Fitzpatrick, Henry A. Ballentine, James M. Ballentine, Mary A. Lawrence, Harriet E. Connolly, Orren McCracken, Frank B. McCracken, Edward F. Lawrence, as administrator of the estate of David Ballentine, deceased,
33 and Henry M. Rector, jr., are defendants, to the Circuit Court of the United States for the eastern district of Arkansas.

Now, if the said Edward F. Lawrence, Harriet B. Connally, Henry A. Ballentine et al., the said petitioners, shall enter into the said Circuit Court of the United States on the first day of the next session thereof a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said court shall hold that said suit was wrongfully or improperly awarded thereto, and do, or cause to be done, such other

and appropriate acts as by the act of Congress approved March the 3rd, 1875, and other acts of Congress, are required to be done upon the removal of a suit unto the United States Circuit Court from a state court, this bond shall be void; otherwise to remain in force.

Dated at Boston, Massachusetts, A D. 1880.

EDWARD F. LAWRENCE,
HENRY A. BALLENTINE,
MARY B. LAWRENCE, AND
HARRIET B. CONNALLY,
34 By HENRY A. BALLENTINE,
Their Attorney in fact.
M. C. O'BRYAN.
JAMES GRIFFITH.

In pr'sence of—
GEO. S. BOUTWELL to E. L. L.

STATE OF ARKANSAS, }
County of Garland, } *ss.*

M. C. O'Bryan states that he is a resident of the state of Arkansas, and is worth one thousand dollars beyond the amount of his debts, and owns and holds property in said state, which is not exempt from seizure and sale under process of the courts thereof, of the value of five hundred dollars

Subscribed in my presence and sworn to before me this day of August, 1880.

Filed August 3, 1880.

J. H. LAW, *Clerk.*

35 Whereas a suit by bill of complaint is now pending in the Circuit Court of the county of Garland and state of Arkansas, brought by one Henry M. Rector, *or* complainant, against Edwin Q. Gibbon, David Kirkpatrick, Henry A. Ballentine, James M. Ballentine, Mary A. Lawrence, Harriet E. Connally, Orrin McCracken, Edward F. Lawrence, as administrator of the estate of David Ballentine, deceased, and Henry M. Rector, jr., all named as defendants in said bill of complaint;

And whereas certain of the parties named, to wit, Mary A. Lawrence and Edward F. Lawrence, are not citizens of the state of Arkansas, but are, and for many years have been, citizens of the state of Illinois; and whereas the said Mary A. Lawrence is desirous of availing herself of the provision of the laws of the United States by virtue of which said suit, so far as she is a party thereto, may be removed from said Circuit Court of said county of Garland, in said state of Arkansas, to the Circuit Court of the United States—

Therefore, know all men by these presents that I, the said
36 Mary A. Lawrence, a citizen of the state of Illinois, but now temporarily in the state of Massachusetts, do hereby constitute

and appoint Henry A. Ballentine, before named, as my true and lawful attorney, for me and in my to make, sign, and execute a petition for the removal of said suit from the Circuit Court of said county of Garland to the Circuit Court of the United States, and in like manner to make and execute such bond or bonds as may be required for the removal of said suit, and by deed, obligation, or recognizance, or however otherwise, in my name and in my behalf to do any act or thing necessary to the removal of said cause as may be required by law, or by any rule or order of court.

Hereby granting unto my said attorney full power and authority to act in and concerning the premises as full and effectually as I might do if personally present.

In witness whereof I have hereunto set my hand and seal this twenty-fourth day of July, in the year one thousand eight hundred and eighty.

[SEAL.] MARY A. LAWRENCE.

In presence of—
GEO. S. BOUTWELL.

37 COMMONWEALTH OF MASSACHUSETTS,
BOSTON, *July 24th*, 1880.

SUFFOLK, *ss.*

Personally appeard the above-named Mary A. Lawrence, known to me to be the same person who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed for the use and purposes therein set forth before the subscriber, a notary public duly commissioned within and for the county aforesaid.

Given under my hand and official seal this twenty-fourth day of July, A. D. 1880.

[SEAL.] CHAS. M. REED,
Notary Public.

Whereas a suit by bill of complaint is now pending in the Circuit Court of the county of Garland and state of Arkansas, brought by one Henry M. Rector as complainant against Edwin Q. Gibbon, David Kirkpatrick, Henry A. Ballentine, James M. Ballentine, Mary A. Lawrence, Harriet E. Connolly, Orrin McCracken, Frank B. McCracken, Edward F. Lawrence, as administrator of the es-
38 tate of David Ballentine, deceased, and Henry M. Rector, jr., all named as defendants in said bill of complaint; and whereas the said Edward F. Lawrence is not and never has been a citizen of said state of Arkansas, but now is and for many years has been a citizen of the state of Illinois;

And whereas the said Edward F. Lawrence in his said capacity as administrator as aforesaid is desirous of availing himself of the laws of the United States by virtue of which said suit, so far as he is a party thereto, may be removed from the said Circuit Court of said

county of Garland, in said state of Arkansas, to the Circuit Court of the United States--

Therefore, know all men by these presents that I, the said Edward F. Lawrence, as administrator of the estate of David Ballentine, deceased, being a citizen of the state of Illinois but now residing temporarily in the state of Massachusetts, do hereby constitute and appoint Henry A. Ballentine, before named, as my true
39 and lawful attorney for me and in my name as such administrator to make, sign, and execute a petition for the removal of said suit from the said Circuit Court of said county of Garland to the Circuit Court of the United States, and in like manner to make and execute such bond or bonds as may be required for the removal of said suit, and by deed, obligation, or recognizance or however otherwise, in my name and in my behalf as such administrator, to do any act or thing necessary to the removal of said cause as may be required by law or by any rule or order of court.

Hereby granting my said attorney full power and authority to act in and concerning the premises as fully and effectually as I might so if personally present.

In witness whereof I have hereunto set my hand and seal this twenty-fourth day of July, in the year one thousand eight hundred and eighty.

EDWARD F. LAWRENCE.

In presence of—
GEO. S. BOUTWELL.

40 COMMONWEALTH OF MASSACHUSETTS, } ss.
Suffolk, }

Personally appeared the above named Edward F. Lawrence, to me personally known to be the same person who subscribed the foregoing instrument, and acknowledged that he executed the same as his free act and deed for the use and purposes therein set forth before the subscriber, a notary public duly commissioned within and for the county aforesaid.

Given under my hand and official seal this twenty-fourth day of July, A. D. 1880.

CHAS. M. REED,
Notary Public.

Petition for removal to United States Circuit Court for eastern district of Arkansas.

In the Garland Circuit Court of the state of Arkansas.

HENRY M. RECTOR
No. 204.] *v.*
41 EDWIN Q. GIBBON, DAVID KIRKPATRICK, HENRY A. BALLENTINE, JAMES M. BALLENTINE, HENRY A. LAWRENCE, HARRIET E. CONNOLLY, ORRIN MCCRACKEN, FRANK B. MCCRACKEN, EDWARD F. LAWRENCE, as administrator of estate of David Ballentine, deceased, and HENRY M. RECTOR, JR.

To said Circuit Court:

Your petitioners, Edward F. Lawrence, administrator of the goods and estate of David Ballentine, deceased; Henry A. Ballentine, James M. Ballentine, Henry A. Lawrence, Mary B. Lawrence, Harriet E. Connolly, Orren McCracken, Frank B. McCracken, and Edwin Q. Gibbon and W. H. Chastain, (who is sued by the name of David Kirkpatrick,) the defendants in the above-entitled cause, show to this honorable court that the property and amount in dispute is said suit exceeds, exclusive of costs, the sum and value of five hundred dollars.

That the controversy in said suit is between citizens of different states, and that at the time of the commencement of this suit the
42 petitioners were, except Edwin Q. Gibbon, who has no interest in said controversy, and Henry A. Ballentine, citizens of other states than the state of Arkansas, to wit, Edward F. Lawrence, who was duly qualified by letters of administration and orders of the Probate Court of Lake county, Illinois, such administrator, James M. Ballentine, Henry A. Lawrence, Mary B. Lawrence, Harriet B. Connally, (sued as Hariet E. Connally,) Orren McCracken, Frank B. McCracken, were then and still are citizens of the state of Illinois, and W. H. Chastain was then and still is a citizen of the state of New York, (that Henry M. Rector, jr., named as a party defendant, has no interest in said controversy distinct from the interest of said plaintiff,) and that the said Henry M. Rector, the plaintiff in said suit, was then and still is a citizen of the state of Arkansas.

Your petitioner further states that in the said suit there is a controversy which arises wholly between the above-named citizens of different states, and which can be fully determined as between them, to wit, a controversy between said Edward F. Lawrence, as
43 administrator aforesaid, and the other petitioners, who are the heirs at law of the said David Ballentine, deceased, and the said Henry M. Rector.

And your petitioners further state that said suit is one arising under the laws of the United States in this, to wit, that said E. Q. Gibbon and W. H. Chastain (sued by the name of David Kirkpatrick) erected and were joint owners and occupants of the buildings and

improvements on the lots and piece of land, on the United States reservation of the Hot Springs of Arkansas, described in said plaintiff's complaint, on the day of June, 1876, when the said lots of land and all the improvements thereon having been taken into possession by a receiver appointed by the United States Court of Claims as the property of the United States, claiming, and decreed to have the paramount title thereto.

Said E. Q. Gibbon and W. H. Chastain as such owners and occupants of said land and improvements leased the same from said receiver, and were by time put into possession as lesees of the said United States, under provisions
44 of the acts of Congress of June 11th, 1870, and being so in possession, for a valuable consideration, to wit, twenty-five thousand dollars, to them paid by said David Ballentine, sold said buildings and all their title and claim to said lots to said David Ballentine, and by permission of said receiver assigned him said lease, delivered him the possession thereof; that said David Ballentine paid the rent due under said receiver's lease, and as the owner and occupant of said improvements by said purchase preferred his claim to be awarded the right to purchase said land by reason of said improvements so owned and occupied by him as aforesaid, under the provisions and within the meaning of the act of Congress entitled "An act in relation to the disposal of the Hot Springs reservation of Arkansas," approved March 3rd, 1877, and acts of Congress amendatory of and supplemental thereto, and upon the proof taken in support thereof his legal representative was by the commission appointed
45 under said act awarded and given a pre-emption right and preference of purchase from said United States of said lots and parcel of land at a price fixed thereon by said commission, which price was afterwards reduced by the act of Congress entitled "An act for the establishment of titles in Hot Springs and for other purposes," approved June 16th, 1880, recognizing the awards and decision of said commission, and that your petitioners, the administrator of the goods and estate of the said David Ballentine, deceased, and the heirs at law of said decedent, under said purchase from said Gibbon and Chastain, (who thereby transferred all their interest,) and under said receiver's lease and award of said commission claim, through the said David Ballentine, under the decision of said Court of Claims and said several acts of Congress and award of said commission, the pre-emption right and preference of purchase of said land, and petitioners are ready and offer to pay the purchase money and price fixed upon said lots.

That said plaintiff, Henry M. Rector, claims in his com-
46 plaint herein that by virtue of the statute laws and decisions of courts of the state of Arkansas he is entitled to hold and possess said lots and parcel of land as public land of the United States, although the said lots have been reserved from sale by act of Congress; and during the existence of said act of reservation, and without holding any improvements on said lots, that he could lease

said lots for a ground rent and collect the same; and although the said lots had been taken into possession by said receiver as aforesaid, in disregard of the said lease of the said plaintiff, as the property of the United States, and leased by said receiver to said David Ballentine, as well as to said Gibbon and Chastain, under the act of Congress entitled "An act in relation to the Hot Springs reservation of Arkansas," approved June 11, 1870, and awarded as aforesaid to said David Ballentine, that he, the said plaintiff, might claim and have the right of pre-emption and preference of purchase of said lots by reason of the said improvements erected by said Gibbon and
47 Chastain under said ground lease of the plaintiff as the true meaning and effect of said act of March 3rd, 1877.

And plaintiff claims and pretends that he has equities under the provisions of the said acts of Congress entitled "An act for the establishment of titles in Hot Springs, and for other purposes," approved June 16th, 1880, and under said state laws which recognize and protect trespassers upon the land of the United States reserved from sale.

And petitioners say that this case, both as to the claim of the plaintiff and of the defendants, arises under the acts of the Congress of the United States.

And your petitioners offer herewith a bond with good and sufficient surety for their entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, or the same are and shall become of record in the Circuit Court of Garland county, Arkansas, by reason of this petition and the proceedings of said state court thereupon.

48 And also for securing and paying all costs that may be awarded by said Circuit Court of the United States if said last named court shall hold that this suit was wrongfully or improperly removed thereto.

Petitioners thereupon pray this honorable court to proceed no further herein except to make the order for removal required by law, and to accept said surety and bond and to cause the record herein to be removed into said Circuit Court of the United States in and for the eastern district of Arkansas, and they will ever pray.

EDWARD F. LAWRENCE,
Administrator, &c.,
MARY B. LAWRENCE,
HENRY A. LAWRENCE,
HARRIET E. CONNOLLY,
ORREN McCRACKEN,
FRANK B. McCRACKEN,
HENRY A. BALLENTINE,
JAMES M. BALLENTINE,
W. H. CHASTAIN, and
E. Q. GIBBON,

By their attorneys, SAM'L W. WILLIAMS and
J. M. HARRELL.

49 STATE OF ARKANSAS,
County of Garland.

John M. Harrell states that he is the attorney of the defendants in this above-mentioned cause in the Garland Circuit Court, and that all of said petitioners, except said Edwin Q. Gibbon, are absent from the state of Arkansas, and that affiant believes that the statements and allegations of said petition are true.

JOHN M. HARRELL.

Subscribed and sworn to before me this — day of ——, 1880.

STATE OF MASSACHUSETTS,
County of Suffolk, ss.

Edward F. Lawrence, the above-named petitioner, states that he has read the within and foregoing petition and knows the contents therein, and verily believes that the statements and allegations of said petition are true.

EDWARD F. LAWRENCE,
Administrator.

JULY 23, 1880.

STATE OF MASSACHUSETTS,
Suffolk, ss.

50 Subscribed by the said Edward F. Lawrence in my presence and sworn to before me this 23d day of July, 1880.

CHAS. M. REED,
Notary Public.

Filed August 3, 1880.

J. H. LAW, *Clerk.*

And afterwards, on Thursday, August 12th, 1880, the same being a subsequent adjourned day of said term, the following proceedings were had, to wit:

HENRY M. RECTOR
vs.
E. Q. GIBBON, HENRY A. BALLENTINE, et al. } 204.

And now on this day come the said defendants, E. Q. Gibbon, Henry A. Ballentine, et al., and by their attorneys, Samuel W. Williams and John M. Harrell, esq's, and the petition of said defendants heretofore filed on the 4th day of August, 1880, which was the 2nd day of the present term of this court, and before the trial of

51 said cause in this court, for the order of this court to remove said suit from this court into the Circuit Court of the United States for the eastern district of Arkansas for trial, coming on to be heard; and it appearing to this court from the said petition that the property and amount in said suit exceeds, exclusive of costs, the sum and value of five hundred dollars, and that at the commencement of said suit said plaintiff was and still is a citizen of the state of Arkansas;

and the said defendants then were and still are, except such as are nominal parties merely, citizens of the state of Illinois and New York; and said controversy is between citizens of different states; and it also appearing that said suit is one arising under the laws of the United States, and that the correct decision of said suit will depend upon the right construction of acts of Congress and laws of the United States, and that said defendants at the time of filing said petition for removal offered and filed in this court a bond to the plaintiff with good and sufficient surety in the sum of five hundred dollars,
52 for their entering in said United States Circuit Court on the first day of the session of said United States Circuit Court next after filing of said petition and bond, a copy of the record of this suit as the same appears of record in this court, and for paying all costs that may be awarded by said Circuit Court of the United States if said United States Circuit Court shall hold that said suit was wrongfully or improperly removed thereto, and for doing or causing to be done such other and appropriate acts as by the act of Congress approved March 3rd, 1875, and other acts of Congress are required to be done upon the removal of a suit into the United States Circuit Court from a state court. It is considered and ordered that said suit be, and the same is hereby removed on the trial thereof to the eastern district of Arkansas, and that a duly certified copy of the record of said suit as the same appears of record in this court be, by the clerk of this court, furnished and transmitted to the clerk
53 of said United States court for filing in said court of the United States, without delay, to the end that petitioners may enter the same into said United States Circuit Court according to the prayer of their said petition and the condition of said bond.

STATE OF ARKANSAS, } *ss.*
County of Garland, }

I, J. H. Law, clerk of the Circuit Court and ex-officio county clerk and recorder within said county, hereby certify that the within and foregoing pages numbered (1) to (47) inclusive, containing a true and perfect transcript of the records, and papers in said cause as appears upon chancery record "A," Garland county, and papers now on file in my office.

Witness my hand and official seal this 23d day of September, A. D. 1880.

J. H. LAW, *Clk.*
[SEAL.] W. WRIGHT, *D. C.*

Costs of this transcript, $13.25.

54 (Endorsed:) Filed September 30, 1880; Ralph L. Goodrich, clerk, by W. P. Feild, d. c.

55 UNITED STATES OF AMERICA, }
Eastern district of Arkansas. }

Be it remembered, that at a Circuit Court of the United States of

America, in and for the eastern district of Arkansas, begun and holden on Monday, the 25th day of October, anno Domini one thousand eight hundred and eighty, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on December 16, 1880:

Henry M. Rector
v.
Elihu B. Smith; } 399.

and

Henry M. Rector
v.
J. W. Parker et al.; } 400.

and

Henry M. Rector
v.
West Steele et al.; } 401.

and

Henry M. Rector
v.
E. Q. Gibbon et al.; } 402.

and

Henry M. Rector
v.
Matilda Lipscomb; } 403.

and

Henry M. Rector
v.
Henry P. Smith; } 404.

and

Henry M. Rector
v.
Thud Taylor et al.; } 405.

and

56 Henry M. Rector
v.
T. W. Beattie et al; } 406.

and

Henry M. Rector
v.
Henry P. Smith et al. } 407.

It is ordered that the above-entitled causes stand and abide by the following stipulation and agreement, which is hereby entered at large upon the record as follows:

It is hereby stipulated and agreed that the answer shall be withdrawn in the case of Henry M. Rector *v.* E. Q. Gibbon et al., and a demurrer shall be interposed raising the question of the sufficiency of the bill upon the ground of jurisdiction, and to the finality of the

decision of the Hot Springs commissioners, which shall be argued at the next April term with like effect as though filed and argued on the proper rule day, and affidavit and certificate to the demurrer is waived; and it is further agreed that the cases of Rector *v.*
57 West Steele et al., Rector *v.* Henry P. Smith et al., and Rector *v.* Henry Smith, Rector *v.* Lipscomb, Rector *v.* J. W. Parker et al., Rector *v.* Elihu Smith, and Rector *v.* T. W. Beattie, and Rector *v.* Thud Taylor, and other cases pending in this court involving the same question shall await and abide the decision on the said demurrer, and if said demurrer is sustained, the same entry shall be made in each of said causes, and demurrer to be formally entered after such decision; and if said demurrer shall be overruled, the parties shall have time to take depositions with like effect as though their answers had been filed and depositions taken under regular rules.

SAM. W. WILLIAMS.
For Defendants in above causes.
F. W. COMPTON,
U. M. ROSE,
For Complainant.

And on the same day the following proceedings were had, to wit:

HENRY M. RECTOR *v.* E. Q. GIBBON. } 402.

58 Comes the defendant by Clark & Williams, esqs., his solicitors, and files herein his demurrer.

Which demurrer is as follows:

Comes the defendant and demurs to the complaint herein, and says that the same is not sufficient in law.

Because they say that plaintiff claims the property described in the complaint on the ground that he was an occupant and owner of improvements thereon, when that question as appears was finally decided by the Hot Springs commissioners, appointed under the act of Congress of March 3rd, 1877; said complaint is otherwise defective.

CLARK & WILLIAMS.

(Endorsed:) Filed December 16, 1880; Ralph L. Goodrich, clerk.

59 UNITED STATES OF AMERICA, *Eastern district of Arkansas.*

Be it remembered, that at a Circuit Court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the eleventh day of April, anno Domini one thousand eight hundred and eighty-one, at the United States court room, in the city of Little Rock, Arkansas, the Hon. George W. McCrary, circuit judge, and Henry C. Caldwell, district judge, pre-

siding and holding said court, the following proceedings were had, to wit, on May 2nd, 1881:

And now, the court being well and sufficiently advised of the matters arising on the demurrer to the bill of complaint:

It is ordered, adjudged and decreed that said demurrer be sustained and said bill of complaint be dismissed and that said plaintiff pay all costs; and comes the said plaintiff by Rose and Compton, his attorneys, and the said defendants by Harrell and Clark and Williams, their attorneys, and said plaintiff prays an appeal to the Supreme Court of the United States, which appeal is al-
60 lowed.

The following opinion was rendered in the case by the circuit judge:

In the Circuit Court of the United States, eastern district of Arkansas, April term, 1881.

HENRY M. RECTOR *vs.* E. Q. GIBBON et al. } Chancery.

On Demurrer to Bill.

The land in controversy is a part of what is known as the Hot Springs reservation in Garland county, Arkansas. The facts as they are set forth in the bill are substantially as follows:

About the year 1839 the complainant entered into the possession of said land. On the 21st of February, 1873, the complainant, through his trustee, made and executed a lease of the premises to respondents, Gibbon and Kirkpatrick. Said lease was
61 declared to be for the purpose of a hotel, bath-house, &c., and *and* the lessees were to pay rent at the rate of $500 a year and $1,500 a year for water privileges. The term was to be three years and three months, beginning on the 21st day of February, 1873; and it was provided that the improvements mentioned therein, to be erected by the lessees, were not to cost more than $12,000, and that at the end of the term the lessor should have a right to take said improvements by paying two-thirds of the first cost thereof, and should take the furniture in said hotel and bath-house by paying its actual value, so that the same should not exceed $8,000. Said lease also contained the following provision:

"The said Gibbon and Kirkpatrick, parties of the second part, hereby agree with Rector, party of the first part, that upon the termination of this lease, upon the terms hereinbefore specified and set forth, they will deliver to said Rector, party of the first part, or to his successors in office, or grantees, or to whomsoever at that
62 time in law may have the right to control said trust property, all the lands that are hereinbefore leased or demised to the parties of the second part by said party of the first promptly, without

failure and free from let or hindrance of any kind whatever, together with all buildings, outhouses, and improvements that may be erected on said premises."

Before said lease was executed the plaintiff had made certain improvements of the value of $1,000. After said lease was made a hotel was built on the premises, and a short time before the expiration of said lease the same was, by agreement, extended until some time in the future, when it might be terminated by written notice. In 1877 the lessees sold and transferred to David Ballentine all their right and claim to said premises. While the original lessees were still in possession, plaintiff gave them the required notice to terminate the lease and requested them to furnish a list of the furniture coming within its provisions, which they failed to do, so that
63 no settlement was ever made. The bill also alleges the death of David Ballentine and makes his administrators and heirs parties defendants.

Soon after the passage of the act of Congress entitled "An act in relation to the Hot Springs reservation in the state of Arkansas," approved March 3, 1877, and the appointment of the commissioners therein provided for, they caused the survey of the aboved mentioned leased lands, and a map of the same was made designating the premises as certain lots in block 89 in the town of Hot Springs.

It appearing that said hotel and certain other improvements were in the street, they were by the commissioners condemned, and were torn down and destroyed. In less than six months after the first sitting of said board of commissioners the plaintiff filed his claim before them to purchase said lots, and the heirs of said David Ballentine filed a like claim, and on a hearing of these matters before said commissioners they awarded the right to purchase said lots to said
64 heirs, although, as the bill alleges, it was fully shown to them that the said David Ballentine, their ancestor, had acquired his possession thereof in no other way than by said lease made by the plaintiff to said Gibbon et al.

It is therefore averred that the respondents should be held to hold said lots as trustees for the use of complainants, who offer to pay any sum that may be found to be due the defendants, or either of them, by reason of any money they may pay out for the purchase of said lands. The prayer is for an accounting, and that respondents be decreed to hold the land as trustees for complainant and required to convey the same to him and for general relief.

F. W. Compton, U. M. Rose, for complainant; M. W. Benjamin, John M. Harrell, Clark & Williams, for respondents.

65 McCRARY, *Circuit Judge*.—Two questions have been discussed by counsel in this case, to wit:

First. Whether the decision of the commissioners appointed under the provisions of the act of Congress of March 3, 1877, entitled "An act in relation to the Hot Springs reservation in Arkansas," upon questions of law and fact submitted to them in accordance with the

terms of the act, is in the nature of a final adjudication and conclusive upon the parties.

2. Whether, assuming that this court may pass upon the correctness of the decisions of that commission, the same ought, upon the merits, to be declared erroneous and set aside.

In considering the first of these questions it is necessary to determine from an examination of the act of Congress the nature of the duties and the extent of the powers of the commission. We shall be aided in our inquiry by a glance at the history of the Hot Springs reservation and of the legislation and litigation concerning
66 the title thereto. For nearly a half century the title to this reservation has been in controversy. It was reserved from sale under an act of Congress approved April 20, 1832, (4 Stat., 505,) and until the passage of said act of March 3, 1877, no law has subjected it to sale, pre-emption, or location.

Certain persons, and among them complainant, claimed title to portions of the reservations. The complainant claimed title under an "Act for the relief of the inhabitants of the late county of New Madrid, in Missouri territory, who suffered by earthquake," approved February 17, 1815, (3 Stat., 211), and other claimants claimed under pre-emptions. In order to settle the controversies which existed, and special reference to the settlement of the claims made under the said "New Madrid grant" and pre-emption laws, Congress passed the act of May 31st, 1870, entitled "An act in relation to the Hot Springs reservation in Arkansas," (16 Statutes, 149.) That act authorized any person claiming title, either legal or equitable, to the
67 whole or any part of the reservation, to institute suit against the United States in the Court of Claims within ninety days from the passage of the act. The proceedings were to be by petition in the nature of a bill in equity, and provision was made for a final adjudication upon the conflicting claims of all parties, as well as between each of them and the United States. The fifth section provided that, in the event of a final decision in favor of the United States, the court "shall order such lands into the possession of, a receiver to be appointed by the court, who shall take charge of, rent out the same for the United States, until Congress shall by law direct how the same shall be disposed of," &c.

Under this act the complainant, Rector, brought suit in the Court of Claims to recover the land now in controversy.

The decree of the Court of Claims was in favor of the United States and adverse to the complainant. Upon appeal to the Supreme Court the decree of the Court of Claims was affirmed, the Supreme Court declaring that none of the complainants were entitled
68 to the lands in question, (92 U. S., 698.) In the opinion the claim of the complainant, Henry M. Rector, is fully considered and held to be untenable.

It was, however, suggested that Congress would doubtless take into consideration any hardship that might ensue from the decision when dealing with the subject of the future disposition of the lands.

Such was the situation when the act of March 3rd, 1877, was passed. That act dealt with the Hot Springs reservation as a part of the public lands of the United States, but at the same time it provided, as we shall see, for ascertaining and protecting the rights of occupants and claimants with respect to improvements. The act provides for the appointment by the President of three discreet, competent and disinterested persons, who shall constitute a board of commissioners with authority to perform and discharge the duties specified by the act. The commissioners were required to take and subscribe the usual oath for civil officers, to sit at the Springs, to give notice of
69 their meeting, and to organize by electing one of their number as chairman.

The fifth and sixth sections of said act are as follows:

SEC. 5. That it shall be the duty of said commissioners to show by metes and bounds on the map herein provided for the parcels or tracts of land claimed by reason of improvements made thereon, or occupied by each and every such claimant and occupant on said reservation; to hear any and all proof offered by such claimants and occupants and the United States in respect to said lands and in respect to the improvements thereon; and to finally determine the right of each claimant or occupant to purchase the same or any portion thereof at the appraised value which shall be fixed by said commissioners; *provided, however*, that such claimants and occupants shall file their claims under the provisions of this act before said commissioners within six calendar months after the first sitting of the said board of commissioners, or their claims shall be forever
70 barred; and no claim shall be considered which has accrued since the twenty-fourth day of April, eighteen hundred and seventy-six."

SECTION 6. That the said commissioners shall have power to compel the attendance of witnesses and the production of papers touching the occupancy or improvements of or on said lands, or any other matter in any wise belonging or appertaining either to the said lands or the improvements thereon, shall have power to examine under oath all witnesses that shall come before them, and all testimony shall be reduced to writing and preserved as hereinafter provided."

The act further requires the commissioners to file in the office of the Secretary of the Interior their report, together with a map and survey showing the boundary lines of each claim and also showing the name of each claimant, of each lot or parcel of land, the appraised value thereof, &c., including all the evidence taken by them respecting the claimant's possessory right of occupation to any
71 portion of the reservation and their find in each case. They were also to issue certificates to each claimant, setting forth the amount of land that the holder is entitled to purchase and the valuation fixed thereon. The eleventh section provides as follows:

SECTION 11. That any claimant or occupant, his heirs or legal representatives, in whose favor said commissioners have adjudicated, shall, under such rules and regulations as the Secretary of the

Interior may prescribe, have the sole right to enter and pay for, at the price fixed by said commissioners, the amount of land the commissioners have adjudged that they were entitled to purchase at any time within twelve months next after the land officers give the public notice herein required.

Counsel for complainant have insisted in argument that the decisions of the commission are of no higher character than those of the officers of the land department, which may be set aside by a court of competent jurisdiction on the ground of fraud, mistake,
72 or misconstruction of the law.

Moore *vs.* Robins, 96 U. S., 530.
Shipley *vs.* Cowan, 91 U. S., 330.
Johnson *vs.* Towsley, 13 U. S., 91.

But it is manifest that Congress intended to clothe this tribunal with extensive judicial powers. There is a broad distinction between its functions and those of the officers of one branch of the executive department referred to. The usual powers of a court of justice were conferred upon the commission. It was organized by electing a presiding officer and to give notice of its sessions. Parties claiming the right to purchase any portton of the lands were required to appear before it. It was clothed with power to compel the attendance of witnesses and to administer oaths; and it was to "finally determine the right of each claimant or occupant to purchase the same (the land), or any portion thereof, at the appraised value." It is not to be supposed that Congress created this commission and clothed it with all these powers merely for the purpose of enabling it to perform the ministerial functions usually
73 devolving upon an officer of the land department. The language of the act, and the surrounding history and circumstances, alike forbid such an interpretation. It was time to have an end of controversy. For half a century the courts and legislatures of state and nation had been vexed with this dispute. The question of title had been finally settled. Congress resolved, through the commission, to have a final settlement of all questions as to improvements and the right to purchase the title. And so it was provided that the commission should "finally determine" these questions. This language, when applied to a special tribunal, must be held to mean a final determination in the absolute sense, although similar language, if applied to officers of the land department, might mean final only so far as a departmental action is concerned. The rule of law above stated, relied upon by counsel for complainants, therefore does not apply. The following rule does apply. Where
74 the law has confided to a special tribunal the authority to hear and determine certain matters, the decision of that tribunal within the scope of its authority is binding upon all parties.

Johnson *vs.* Towsley, 13 Wall., 83.
Lytle *vs.* Arkansas, 9 How., 33.
Boutner *vs.* Ventress, 8 Martin La., N. S., p. 644; S. C., 20 Am. Decisions, 266.

I am clearly of the opinion that the proceedings before the commission were in their nature judicial; that its jurisdiction, though limited and special, was plenary with respect to the particular matters specified in the act, and that its decision upon those matters is an adjudication which cannot be attacked in the present proceeding.

This conclusion disposes of the demurrer independently of the question whether the commission erred in its decision upon questions of law. I am, however, of the opinion that the statute authorized the finding. The board evidently considered that no right to purchase could be based upon any claim of title to the
75 lands on the part of any of the claimants, and this for the reason that such claims had been held to be unfounded by the Supreme Court of the United States.

They were bound to assume that complainant had no title to the lands whatever, legal or equitable, and that therefore he could make no valid lease and confer no rights upon the respondents in respect to the lands. They were, no doubt, of the opinion that the fact that certain persons had claimed the title, and had assumed to lease portions of the land to others, and to authorize the erection of improvements thereon, upon certain terms and conditions, could not be considered after the decision of the Supreme Court against such claimants. Did the law require them to recognize any claim based solely upon the fact that the complainant had assumed to be the landlord and had undertaken to lease the land? I see nothing in the statute that required such recognition. The history of the controversy shows that certain persons, including the complain-
76 ant in this case, made claim to the title, and that while making such claim they executed leases upon the premises.

By a decision of the Supreme Court their claim was found to be unfounded. Their authority to lease did not exist. They and their supposed tenants wese ejected by their true owner, the United States; but not until after they had for a long time enjoyed the rents and profits. When Congress came to dispose of the land and improvements, it did not see proper to make any special provision for these original claimants. If it had been intended to recognize any claim in them based upon or growing out of their unfounded claim of title, that intention would have found expression in words. The claimants were well known; they had long been before Congress; their cases had just been decided by the Supreme Court, and it was that decision which led to the passage of the act of 1877, and yet they are not named in the act. It provides certain relief for "occupants"
77 and "claimants" and leaves the commission to finally determine who are entitled to relief under this general designation. If the commission held, as I suppose it did, that under all the circumstances and in view of the terms of the act, persons who actually made improvements at their own expense were entitled to the right to purchase, without reference to the fact that some of them had entered under leases given without authority by persons claiming but not having an interest in the land, I think the decision was within

their discretion, and I see no reason to question its perfect propriety. Because certain persons had without authority gone upon the land, leased it out, receiving for a series of years rents to which they were not entitled, it certainly does not necessarily follow that they were entitled to the exclusive right to purchase at the sale. Of course if these original claimants had themselves expended money in making improvements they would have been entitled to consideration, but the fact that Rector assumed to own the land of the United States and to make a lease of it, conferred no right upon him and placed no restrictions upon the right of the United States to dispose of the lands. Congress evidently intended to authorize the commission to deal with the occupants and claimants upon the theory that no right had been acquired under the leases executed by persons having no claim upon the land.

78

That those persons acted in good faith in making leases cannot alter the case. If they had in good faith made the improvements the case would have been different. But the leases were under the decision of the Supreme Court clearly invalid. The United States was not bound to recognize them and has not done so. The demurrer to the bill is sustained.

Caldwell, district judge, concurs.

79 UNITED STATES OF AMERICA, }
Eastern district of Arkansas. }

I, Ralph L. Goodrich, clerk of the Circuit Court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writing annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office.

In witness whereof I have hereunto set my hand and the seal of said court this 4th day of June, in the year of our Lord one thousand eight hundred and eighty-one and of the Independence of the United States of America the one hundred and fifth.

[SEAL.] Attest: RALPH L. GOODRICH, *Clerk.*

(Indorsement on cover:) E. Arkansas; C. C. U. S. Henry M. Rector, appellant, *vs.* E. Q. Gibbon et al. Filed 11 July, 1881. 79 pages.

111-216

SUPREME COURT, U. S.
FILED
FEB 29 1884
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

HENRY M. RECTOR, *Appellant.*

vs.

E. Q. GIBBON, *et al*, *Appellees.*

BRIEF FOR APPELLANT.

Mitchell & Bettis, Printers, Little Rock.

IN THE

Supreme Court of the United States.

HENRY M. RECTOR, *Appellant.*

vs.

E. Q. GIBBON, *et al*, *Appellees.*

BRIEF FOR APPELLANT.

The suit in this case was brought to recover certain lands, described in the pleadings, being a part of what was known as the Hot Springs reservation, in the State of Arkansas; and a demurrer to the bill was sustained in the Court below.

The facts necessary to be stated, as they appear upon the face of the bill, are substantially the following:

About the year 1839, the Appellant entered into the possession of the land in controversy, and remained in the exclusive possession thereof, from that time until the first day of June, 1876, when he was dispossessed by a Receiver appointed by the Court of Claims of the United States. The Appellant entered into such possession under the location of a New Madrid claim which had been located on the

land, and so held the same until it was decided by the Supreme Court of the United States, in the year 1875, that said claim was invalid by reason of an informality in the proceedings relating to the location thereof—his possession being subject to that of said Receiver after his appointment as aforesaid.

On the 21st day of February, 1873, the Appellant, through his Trustee, made and executed a lease of the premises to the Appellees, Gibbon and Kirkpatrick, for the purpose of a hotel, bath-house and out-houses, at the annual rent of five hundred dollars a year, and fifteen hundred dollars a year for water privileges, for and during the term of three years and three months, beginning on the 21st day of February, 1873, and ending on the 21st day of May, 1876; and it was provided in said lease that the hotel and other improvements therein mentioned, should not cost more than twelve thousand dollars, and that at the end of the term the Lessor should have the right to take said improvements by paying two-thirds of the first cost thereof, and should take the furniture in the hotel and bath-house by paying its actual value, so that the same should not exceed eight thousand dollars, and that if the Lessor should not pay said amounts at the end of the term, then the term should be extended on the same conditions named in the lease, until the Lessor should make such payments, giving ninety days notice of his intention to terminate the lease.

The said lease also contained the following provision:

"The said Gibbon and Kirkpatrick, parties of the second part, hereby agree with Rector, party of the first part, that

The amended declaration contains three counts.

The first count avers that the defendant was using the tracks with the consent and knowledge of the Illinois Central; that the tracks were constructed by the latter company under authority of an ordinance of the City of Chicago, whose terms had been accepted by it; that said ordinance provided that the Illinois Central should erect and maintain "such suitable walls, fences and other sufficient works as would prevent animals from straying upon or obstructing its tracks, and secure persons and property from danger;" and that the Illinois Central had not, nor had the defendant, erected such structures.

The third count avers that the park was used extensively as a common, or play ground, and place of resort, and that there were no fences separating the park from the tracks, or any other means used by the defendant to prevent children from straying upon the tracks.

In the second count the allegations of the first and third are combined.

There is no statute of the State of Illinois under which it was the duty of the Illinois Central or Michigan Central to fence the right of way at the place of the accident. It is not so claimed by the plaintiff. It is alleged that the duty exists (1) at common law, (2) by force of the ordinance of the City of Chicago granting the right of way to the Illinois Central, and not otherwise.

I.

The defendant is not liable at common law for failure to fence the right of way.

"It seems to me to be well settled by a series of well considered decisions, both in this country and in England, that where there exists no statutory regulation defining the duties of railroad companies in respect to fences, they are under no obligation to make or maintain fences between their roads and the adjoining lands. They come under the common law rule; and at common law the owner of land is not obliged to fence against his neighbor."

Gilpin C. J. in Vandergrift v. Delaware R. R. Co., 2 Hovst, 287.

"We know of no principle of common law, and there is certainly no statute which compels one person or corporation to fence the land of another. It was never supposed when a public highway was laid out that the owners of land over which it passed would have any right to require the authority by which it was constructed to enclose it by fences; and yet there is no distinction in principle between the obligation to fence a public highway and a railroad."

Trumbull J. Alton, &c. R. R. Co. v. Baugh, 14 Ill., 211.

Neither landowner nor railroad company, in the absence of statute, has the right to require the other to prevent trespass by maintaining a fence.

Boston, &c., R. R. Co. v. Briggs, 132 Mass., 24.

This doctrine is held in the following States:

California—

Richmond v. Sacramento, &c., R. R. Co., 18 Cal. 351.

Delaware—

Vandergrift v. Delaware R. R. Co., Ub. Sup.

Georgia—

Macon, &c., Co. v. Baber, 42 Ga. 300.

Illinois—

Alton, &c., v. Baugh, Ub. Sup.
Chicago, &c. Co. v. Patchen, 16 Ill. 198.
Ill. Cent. Co. v. v. Reedy, 17 Ill. 581.

Indiana—

Williams v. New Albany, &c., Co. 5 Ind. 111.
Indianapolis, &c. v. McClure, 26 Ind. 370.
M. S. & N. I. Co. v. Fisher, 27 Ind. 96.
R. R. Co. v. Harter, 38 Ind. 557.

Iowa—

Henry v. Dubuque, &c. Co. 2 Ia. 303.

Kentucky—

Louisville, &c. Co. v. Milton, 14 B. Mon. 75.
Louisville, &c. Co. v. Ballard, 2 Met. 177.

Louisiana—

Knight v. Opelousas R. R. Co., 15 La. Ann. 105.

Maine—

Perkins v. Eastern R. R Co., 29 Me. 307.

Massachusetts—

Stearns v. Old Colony R. R. Co., 1 Allen, 493.
Boston, &c. &c. v. Briggs, Ub. Sup.

Michigan—

Williams v. Mich. Cent. R. R. Co., 2 Mich. 259.

Minnesota—

Locke v. First Div., &c., Co., 15 Minn. 350.

Mississippi—

New Orleans, &c. Co. v. Field, 46 Miss 573.

Memphis, &c. Co. v. Orr, 43 Miss. 279.

Missouri—

Gorman v. Pacific, &c. Co. 26 Mo. 441.

New Jersey—

Vandegrift v. Rediker, 22 N. J. L. 184.

New Hampshire—

Woolson v. Northern R. R. Co., 19 N. H. 267.

Chapin v. Sullivan R. R. Co., 39 N. H. 53.

New York—

Tonawanda R. B. Co. v. Munger, 5 Den. 255 S.C. aff. 4, N. Y. 345.

Corwin v. N. Y. &c. Co. 13 N. Y. 42.

Ohio—

Kerwhacker v. C. C. &c. Co., 3 Ohio, 185.

Pennsylvania—

Ry. Co. v. Riblet, 66 Pa. St., 164.

Ry. Co. v. Skinner, 19 Pa. St., 287.

Rhode Island—

Town v. Prov. &c., Co., 2 R. I., 404.

South Carolina—

R. R. Co. v. Sineath, 8 Rich., 185.

Vermont—

Hurd v. Rutland, &c., R. R. Co., 25 Vt., 123.

Wisconsin—

Stucke v. Milwaukee, &c., Co., 9 Wis., 202.

In re Rensselaer Co., 4 *Paige*, 553, *contra* has been disregarded and practically overruled by the subsequent decisions in New York cited above. *Quimby v. R. R. Co*, 23 *Vt.*, 387, also *contra*, is followed as to the corporation involved in *Trow v. R. R. Co*, 24 *Vt.*, but the doctrine above set forth is fully recognized in the *Hurd* case, 25 *Vt.*, cited above, where the company's liability is put wholly upon the ground of the statutory provision.

II.

The defendant is not liable under the ordinance referred to in the declaration.

The ordinance was passed June 15, 1852. (Record p. 18.) It granted permission to the Illinois Central Railroad Company to construct its tracks along the margin of the lake from the Northern limit of the city to the north line of Randolph Street. (Sec. 1, Record p. 18.) From Park Row on the South to Randolph Street on the North was a space of open water called Lake Park. Michigan Avenue bounded it on the West, with but a narrow strip of land intervening between it and the water, (Record p. 25). The ordinance granted the Illinois Central the use in perpetuity of a width of 300 feet across this space; the tracks to be distant 400 feet from Michigan Avenue and parallel to it. (Sec. 2, Record p. 19). Other rights of way were given which are not material in this connection.

The concluding section of the ordinance was as follows, (Record p. 21):

"Sec. 12. Upon the acceptance of this ordinance by the "said Company, (which shall be within ninety days of the "passing of the same,) a contract or agreement embodying the "provisions herein contained, and stipulating that the permis- "sion, rights and privileges hereby conferred upon said Com- "pany shall depend upon the performance on their part of the "requirements made upon them by this ordinance, shall be "executed, sealed and delivered, on the part of the City of "Chicago by its mayor, and on the part of the Illinois Central "Railroad Company by the president thereof, but in usual "legal form."

Accordingly under date of March 28, 1853, an agreement was entered into between the Common Council and the Illinois Central Railroad Company, under the seals of the City and Company, which recited the ordinance in full, and the action of the Railroad Company in authorizing the execution of the agreement by its officers, and witnesseth: that the rights "given and granted by virtue of and according to the "true intent and meaning of the said ordinance hereinbefore "recited and set forth, and made a part of this agreement, are "hereby confirmed and ratified, and made forever binding "upon the said City of Chicago," etc., and that in consideration of the said *grants, covenants and agreements*, the said Illinois Central Railroad Company, "do hereby *covenant* and *agree* to "and with the said City of Chicago," to perform all the terms of the ordinance, "and the said parties do hereby mutually "and severally declare and affirm this agreement to be made "in accordance with the terms of said ordinance, and the "acceptance thereof, as above recited and set forth, and for "the purpose of confirming, ratifying and establishing the same "as of binding and perpetual obligation between said *contract- "ing* parties, hereby agreeing and covenanting each with the "other, to stand to, abide by, and to do and perform all the "obligations therein contained, according to the true intent, "meaning and interpretation thereof, forever, subject to the

"limitations, restrictions and forfeitures therein contained." (Record p. 24.)

The provision of the ordinance and agreement, out of which liability is alleged to have sprung, is as follows:

"Sec. 6. The said Company shall erect and maintain in "the western or inner line of the ground pointed out for its "main track, on the lake shore, as the same is hereinbefore "defined, such suitable walls, fences, or other sufficient works "as will prevent animals from straying upon or obstructing "its tracks, and secure persons and property from danger, "said structure to be of suitable material and sightly appear-"ance, and of such height as the Common Council may direct, "and no change therein shall be made, except by mutual con-"sent, etc." (Record p. 20.)

1. The ordinance and agreement between the city of Chicago and the Illinois Central Railroad Company, create no liability other than in covenant.

A municipal corporation is a political division of the State, executing delegated powers. In so far as it exercises the powers conferred, either in legislative or administrative acts for the weal of the State at large, it is a representative of the State. Its public functions are parcel of the functions of the State itself, and in assisting the State in the administration of governmental affairs, it is an agency of the State; and acts in a public capacity.

But in purely local enterprises it acts in a private capacity.

Its responsibilities are co-ordinate with its powers. As a department of State, it is exempt. As a corporation dealing

with property possessed by it for its own special advantage, it is liable.

It has a dual character, "the one governmental, legislative, or public; the other in a sense proprietary or private."

1 Dillon Munic. Corp., Sec. 66.

In its proprietary or private character it deals with the property which belongs to it, and which it does not hold in trust for public uses.

The proceedings of the municipal council in which authority in that regard is vested, touching the management or sale of the private property of the corporation, have not the force of general laws, though legislative in form. Especially is this so when the legislation is but expressive of the terms upon which the corporation will contract with reference to its private estate. And when the undertakings of the city and of the party with whom it deals in its private capacity, have been embodied in an authoritative agreement, their rights and responsibilities rest in contract, and not in law.

The city of Chicago was seized of the property upon the lake shore, not as a public fiduciary, but absolutely in its proprietary or private capacity. Moved by considerations of local advantage it proposed through the medium of the ordinance to grant this property to the Illinois Central Company. The ordinance was not the grant; it gave no right—it created no duty. It was legislation preliminary to a contract. If it were a general law it would be effectual in itself. To energize it the assent of the railroad company would not be necessary. But the ordinance invites the acceptance of the company. It is inoperative until accepted, and, that the concurrence of the parties and their respective rights may be undoubted, requires the execution under seal and delivery of an agreement upon the terms of the ordinance. The transaction is between vendor and vendee. The obligations of the city and railroad company lie in covenant.

The Illinois Central may be liable to the city for a breach, but the ordinance and agreement cannot be the basis of liability to a citizen.

The case is illustrated by:

Atkinson v. New Castle and Gateshead Water Works Company, L. R., 2 Exch., Div. 441, 1877.

The defendant company was incorporated by Act of Parliament to supply water to the people of New Castle. The Water Clauses Act required the company to keep its pipes, to which fire plugs were fixed, charged with water at a certain pressure. In an action by a citizen who had suffered loss through fire, the demurrer to the declaration which charged failure to perform this duty was overruled by the Court of Exchequer, but the judgment was reversed by the Court of Appeals.

Lord Chancellor Cairns does not dispute that the Act creates a statutory duty, but holds that it "was no part of the "scheme of the Act to create any duty which was to be-"come the subject of an action at the suit of individuals, "to create any right in individuals with a power of en-"forcing that right by action." He doubts the authority of *Couch v. Steel*,* and ventures to doubt whether the authorities cited by Lord Campbell in that case justified the broad proposition there laid down; "that wherever "a statutory duty is created, any person who can show that he "has sustained injuries from the non-performance of that duty, "can bring an action for damages against the person on whom "the duty is imposed." He thinks it must depend on the purview of the Legislature, and particularly so when the Act is "not one of public and general policy, but is rather in the "nature of a *private legislative bargain*"

Chief Justice Cockburn concurs and distinguishes the case from *Couch v. Steel*, because there the Act was a public general Act, applicable to all the Queen's sub-

* 3 E. & B., 402.

jects, while the Court was "dealing with certain obligations imposed by the legislature upon a private company as the conditions upon which parliament granted them "the powers under which they carried out their undertaking."

It is submitted that no general civil liability can be predicated upon the ordinance.

2. No default is shown in the performance of the conditions of the ordinance and agreement.

Action by the city was a pre-requisite to performance by the company.

Some direction from the council as to the height of the structure, was a condition precedent to the obligation of the company to erect it.

Where the liability is uncertain, and depends for certainty upon the acts or declarations of the promisee, he is bound to acquaint the promisor with his determination before charging him with a violation of duty.

Lent v. Padelford, note, 2 Am. L. C., 65.

Citing—

Center v. Center, 33 N. H., 318.
Watson v. Walker, 23 N. H., 471.
Bashford v. Shaw, 4 Ohio St., 263.
Walker v. Forbes, 25 Ala., 139.
Vyse v. Wakefield, 6 M. & W., 442.
" 7 " 126.

When place of performance depends on the will of the obligee, notice of the place is a condition precedent to fulfillment.

West v. Newton, 1 Duer, 284.

So when plaintiff declared on a covenant, under which defendant was to expend money, under the direction of a surveyor. It was held that the appointment of the surveyor was a preliminary step, a condition precedent, for the defendant could not fulfil his covenant without the approval of the surveyor.

Combe vs. Greene, 11 M. & W., 480.

Following this, it is held that "if something be left indefi-"nite, not located or selected, and to be determined by the "will of the covenantee, so that the covenantor could not "know until that will was expressed, upon just what his "money or labor were to be applied," then the direction of the covenantee is a condition precedent, for which the covenantor must wait before performance.

Folger, J., Brooklyn vs. Brooklyn, Etc., R'y Co., 47 N. Y., 475.

The provision of Sec. 6 of the ordinance and agreement is that the Company shall erect structures "of such height as the "Common Council may direct." (Record p. 20.)

It is manifest that without some direction as to the height, no structure could be built which should comply with the terms of this agreement. The height desired was a matter solely within the knowledge of the Council, which, until some expression was given by that body, evidently could not be known to the railroad company. The knowledge of the height was not merely convenient, it was indispensible; without it the duty of the company was utterly indefinite.

This is not the case of a duty imposed by general statute, as in the cases cited (pp. 35, 36,) in brief of plaintiff in error. Here the relation between the city and the company was purely one of contract, and the rules governing the contracts of private persons must be held to apply. If so, the city cannot complain of the non-performance of the agreement in this respect; much less can an individual.

3. A failure to perform the terms of the ordinance and agreement, between the City of Chicago and the Illinois Central Railroad Company would give no rights, except *inter partes.*

Strangers to the contract could not benefit by it.

Lowery vs. Brooklyn City R'y Co., 76 N. Y., 28.

The defendant, a Street Railway Company, agreed with another to put in the switch connecting the two roads, as a condition to a license to run over the road of the latter company. But, after it was placed, the switch became part of the latter company's track, and the defendant had no duty as to keeping it or the track in repair. The company owning the track had a contract with the city, by which it was bound to keep the pavement within, and for three feet on each side of its track, in repair. The switch was properly placed originally but became displaced and injured the plaintiff, who brought this action against the company which laid it. Held that defendant was not liable to an individual so injured; that the defendant was not bound to keep the pavement in repair, as by contract that duty was entrusted to the other company.

The case at bar is distinguishable from those cited by plaintiff in error, wherein it was held that a duty imposed by general statute upon all railroad companies was incumbent upon companies operating under lease.

4. The ordinance imposed no duty towards intruders upon the track.

The protection of trespassers was not the purpose of any stipulation of the ordinance and agreement.

The structures were to be such as would "prevent animals "from straying upon or obstructing the track, and secure per- "sons and property from danger." This provision sought the security of persons and property being transported upon the tracks, not of persons and property intruding upon the tracks. Animals were provided against, other property could not well intrude.

5. The requirement of the ordinance had no reference to the place of the accident.

Right of way was granted from the city limits to "the south bounds of the open space known as Lake Park." From this point across the open space to Randolph street, the track was built upon piles. It was open water between the shore line and the tracks, a distance of 200 or 300 feet.

The fences were to be erected on the western line of the *ground* pointed out for its main track, *on the lake shore.*" (Sec. 6, Record, p. 20.) By Sec. 9, which relates entirely to the portion known as Lake Park, the company was prohibited from placing any obstruction to the view of the lake from the shore, and was permitted to erect "only such works as are "proper for the construction of their necessary tracks, and "protection of the same."

It is clear the ordinance and agreement required structures to be erected from the city limits to the south end of Lake Park; but at the time of the passage of the ordinance, in 1852, open water separated the tracks from the main land, and this condition continued till 1871, when the filling in com-

menced with debris from the great fire. Regarding this circumstance in connection with the prohibition of the 9th section, it is manifest that Section 6 was not intended to relate to this locality.

6. The ordinance, dissociated from the agreement between the city and company, cannot create a civil liability enforceable at common law.

It was *ultra vires* the corporation to give it such effect.

The power of the legislature is plenary to compel action on the part of the citizen, and inaction may be unlawful and remediable civilly. But a municipality cannot by ordinance create a civil duty.

Van Dyke v. Cincinnati et al, 1 *Disney*, 531, was an action founded upon an ordinance requiring the removal of snow from the sidewalks. It was held the city had no power to impose an obligation attended by civil liability. The learned court say that to bestow such power in effect "would be to invest "the municipal corporation with the highest attributes of "sovereignty."

The same principle was enunciated in

Phila. & Red. R. R. Co. v. Erwin, 89 Pa., St. 71.

in an action upon an ordinance requiring cap logs to be placed upon piers.

Heeny v. Sprague, 11 R. I., 456.
Flynn v. Canton Co., 40 Md., 312.

are in line.

NORTH
Lake Michigan.
Michigan Ave.
Peck Ct.
Elbridge Ct.
Harmon Ct.
12th Street
Park Row
400'
400'
330'
285'
289 ft.
66'
66'
66'
66'
~150'

It has been said that no statute of its State compelled the Railroad Company to fence its right of way.

The portions of its charter having possible reference to the subject matter are found in the Record, pp. 31 and 32.

It scarcely will be claimed that under any of the powers enumerated, in the sections quoted in the record, the city was authorized to require it on behalf of the State.

It must be concluded that to create civil liability by ordinance was without the scope of municipal authority.

III.

There is no evidence that the alleged failure to fence was the proximate cause of the injury.

The plat annexed represents the scene of the accident, and is a portion of Exhibit " A," of the record.

The railroad tracks were carried across the open space called Lake Park upon piles, a distance of more than a mile. Between the strip of land which bordered Michigan avenue and the track, was open water. After the fire of 1871 the space was gradually filled up with debris. About two years before the accident the part of the open space north of Peck court was filled up. The last part filled up was between Harmon and Peck courts. The part near the place of the accident was being filled up the winter of the year previous to the accident, and was pretty well filled up the spring of that year, and at the time of the accident was all filled up west of and under the tracks. East of the track it was filled up irregularly. South of Peck court

it was not filled in well. That at the point "*a*" was a band stand. From Park row to a point about in line with the north side of Harmon court, to the point "*b*," upon the plat, the Illinois Central had erected a five board fence upon the western line of its right of way, in 1872, which was in good repair at the time of the accident except that the north end had been broken down. People would climb over the fence and go down to the track to a point where they could get upon the breakwater.

Record pp. 25 and 26.

It has been recited that the plaintiff, an apparently bright and full grown boy of eight years and nine months, after playing for some time in a vacant lot near his home, and visiting a candy store to spend some money which he had found, followed a procession for eleven blocks, going upon Michigan avenue as far south as Twelfth street. He returned as far as the park to play tag, and when next located is at the immediate place of his injury. Yielding to the example of his colored playmate who had caught upon the train, he was running along beside it with his hand extended towards the car when he fell beneath it.

Record, pp. 28 and 29.

From these facts the jury would not have been justified in finding that his presence upon the tracks was solely consequent upon the failure of the Company to fence, even if that duty were held to rest upon it.

The Illinois Central was not at liberty to fence across Park Row. It had in fact fenced from Park Row to the north side of Harmon court, and from Harmon court to Eldridge court it was pretty well filled in. It was open to the plaintiff to enter upon the track in one of three ways. He was injured at the point "*c*" upon the plat. He might have passed upon the right-of-way at Park Row; he might have climbed the fence, which would not seem an extraordinary achievement for a lad who had accomplished as much as he had that afternoon; or he might have crossed the territory north of Harmon court, which

was pretty well filled with refuse. But no one can testify which course he pursued. No negligence is charged after he came upon the right-of-way. It is claimed the defendant should have prevented him from coming upon the track, and that this would have been accomplished had a fence been built where there was none. It is submitted the evidence does not require this inference, and that it would not be permissible for the jury to assume that with three paths open to him, the plaintiff in fact made use of the one which alone, in any view of its responsibilities under the ordinance, could charge the defendant.

A verdict cannot rest upon assumed facts. The jury should not be permitted to wander "into the region of conjecture and speculation."

Railroad Company vs. Houston, 95 U. S., 697.

It is the settled law of this Court that when the evidence given at the trial, with all the inferences that the jury reasonably could draw from it, is insufficient to support a verdict for plaintiff, so that such a verdict, if rendered for plaintiff, must be set aside, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendant.

22 Wall. 116.
97 U. S., 319.
101 U. S., 16.
104 U. S., 533.

And recently it has been decided by the House of Lords, upon careful consideration of previous cases in England, that it is for the judge to say whether facts have been established by evidence from which negligeuce reasonably and legitimately can be inferred, and for the jury to say whether from such facts negligence ought to be inferred.

Metropolitan R y Co. vs. Jackson, 3 App. Cas., 193.
Gray, J., in Randall vs. R. R. Co., U. S. Sup. Ct. Dec. 10, 1883, 3 Sup. Ct. Rep., pt. 6, p. 322.

To summarize the argument:

There is no statutory duty upon defendant to fence the right of way.

There is no common law duty.

The ordinance imposes no duty, because:

1. The performance of its conditions rest in covenant.
2. The plaintiff and defendant are strangers to the contract.
3. The city has not determined the height of fence; a condition precedent to performance.
4. The ordinance has no application to the place of the accident.
5. The ordinance was not intended for the protection of intruders upon the track.
6. The city was not competent to create a general civil liability by ordinance.

The alleged failure to fence is not shown to have been the proximate cause of the injury.

It is submitted the judgment should be affirmed.

ASHLEY POND,
Attorney for Defendant.

111-228

OFFICE SUPREME COURT U.S.
FILED
MAR 21 1884
R. KENNEY, CLERK.

Supreme Court of the United States.

October Term 1883. No. 263.

ROBERT HAYES, A MINOR, BY GEORGE C. FRY,
HIS NEXT FRIEND, PLAINTIFF IN ERROR,

vs.

THE MICHIGAN CENTRAL R. R. CO.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Supplement to brief for defendant, with citation of statutes and cases referred to on the argument not cited in the brief.

I.

Prior to 1855 there was no statute in Illinois requiring railroad companies to fence their tracks. The first act on that subject was approved February 14, 1855. (Session Laws 1855, p. 173.)

That act required railroad companies to fence their tracks within a time limited, "and thereafter maintain fences on the sides of their road * * * * * suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting on such railroad, except at the crossing of public roads and highways, *and within the limits of towns, cities, and villages;*" also required the construction of cattle-guards, and declared that "so long as such fences and cattle-guards shall not be made, * * * * and when

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such fences and cattle-guards are not in good repair, such railroad corporation and its agents shall be liable for all damages which shall be done by the agents or engines of any such corporation to any cattle, horses, sheep, or hogs thereon."

In 1872 an act was passed for the organization of cities, villages and towns, subdivision 26 of section 1 article 5 of which act gives authority "to require railroad companies to fence their respective roads, or any portion of same, * * * * *," and provides that "In case any railroad company shall fail to comply with any such ordinance it shall be liable for all damages the owner of any cattle or horses or other domestic animals may sustain by reason of injuries thereto while on the tracks of such railroads in like manner and extent as under the general laws of this State relative to the fencing of railroads." (Cothran's R. S. Illinois, 1880, p. 227.)

"Afterwards and long before the injury to plaintiff the city of Chicago organized under this act." (City of Chicago *v.* The People, 80 Ill., 496.)

Under the general laws requiring railroad companies to fence their tracks, it is held that no liability arises for failure to fence, except as provided by the very terms of the statute. (Wabash, &c., R. R. Co. *v.* Brown, 5 Bradwell, 593; D. P. & G. R'y Co. *v.* ———, 12 Bradwell, 443.)

It is suggested that the liability under the ordinance in question must be held within the limits of the liability under the general laws as thus construed.

II.

To the proposition marked "6," page 10 of brief, that the ordinance of the city of Chicago in question, giving it the construction contended for by plaintiff in error, cannot be held to create a civil liability enforcible at common law, should be added the further proposition: That a violation

of such ordinance cannot be held to be evidence tending to establish a cause of action.

This proposition is sustained and the reason upon which it rests clearly stated in Phila. & Red. R. R. Co. *v.* Ewin, 89 Pa. St., 71; and see upon the same point, in addition to the cases cited in the brief, Taylor *v.* R'y Co., 45 Mich., 74.

The contention on the part of plaintiff in error that even if the ordinance could not be invoked in his behalf, either as giving a cause of action or as evidence tending to show negligence towards him, that it was, nevertheless, a question for the jury to determine whether, under the situation and circumstances, it was not negligence on the part of the defendant not to maintain a fence, is not sound.

If a common-law duty had rested upon the defendant to provide a barrier or safeguard of some kind at the place of the accident to prevent persons from coming upon its right of way and tracks, then the question of whether it was not negligence not to maintain a fence as such safeguard might have been for the jury.

But there was no common-law duty to provide any such safeguard, and hence no question for the jury as to whether such duty had been violated.

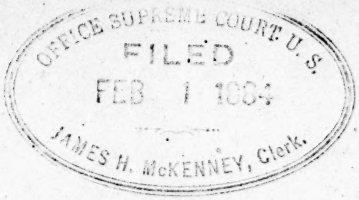
The cases cited on the argument from Massachusetts, Eaton *v.* R. R. Co., 129 Mass., 3, and like cases referred to in the argument, which hold that it is for a jury to say whether it is not negligence on the part of a railroad company not to station a watchman or maintain a gate at a highway crossing at grade, clearly state the distinction. They go upon the ground that persons traveling upon the highway have a lawful right to cross the tracks of the railway company, and that at common law the company is bound to provide safeguards on their behalf against injury from passing trains, and hence that the question of the sufficiency of the safeguards which

in any particular instances have been provided, and whether or not the company has been negligent in the premises, is for the jury.

That the doctrine as to intruders upon the track is different, see Morissey *v.* R. R. Co., 126 Mass., 377, read on the argument.

ASHLEY POND,
Of Counsel for Def't in Error.

111-270



IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1883.

NO. 261.

HENRY M. RECTOR, APPELLANT,

vs.

E. Q. GIBBON, ET AL., APPELLEES.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

CLARK & WILLIAMS,

LITTLE ROCK, ARK.,

ATTORNEYS FOR APPELLEES.

IN THE

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HENRY M. RECTOR, APPELLANT,

vs.

E. Q. GIBBON, ET AL., APPELLEES.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

This suit was brought in the Circuit Court of Garland County on the Chancery side, for the purpose of enforcing a resulting trust on certain lots awarded to the appellees, the heirs of David Ballentine, by the Hot Springs Commissioners, under the act of Congress of March 3d, 1877.

The trust is claimed by appellant to result from the relation of landlord and tenant, which he avers existed

between himself and Gibbon, and Kirkpatrick, under whom David Ballentine got possession of the land and improvements, which gave his heirs the status in reference to the property, which enabled them, after his death, to get the award by the Hot Springs Commissioners of the pre-emption, or preferred right of purchase from the United States.

The bill does not aver that Ballentine's heirs, the real parties in interest in whose favor the award was made, had purchased the land or procured the patent. The bill is fatally defective on that ground, as decided by the Supreme Court of Arkansas in case of Gaines vs. Molen. Manuscript opinion in the Supreme Court of Arkansas, at November term 1883. But as, in point of fact, it is true that the heirs have purchased, no stress was, or now is, laid upon this point. The appellant, in his bill discloses the fact that his claim for the property and that of the Ballentine's was submitted to the Commissioners, a contest occurred before them, as a tribunal, and there was a decision against him. He proposed in this case that the Circuit Court of Garland county in Chancery should review the decision of the Commissioners.

This pretended trust was as much open to be investigated and in issue before the Commissioners, as any other fact. The cause was removed from Garland county to the Circuit Court of the United States for the Eastern District of Arkansas, on the two fold ground set up in the petition, either of which is sufficient.

1st. That the principal parties in interest among the defendants, were residents of a different State to plaintiff, who was a citizen of Arkansas.

2nd. That the rights of the parties arose under and involved the construction of an act of Congress. After the removal, the defendants withdrew their answer and interposed a demurrer, which was sustained, and a decree was rendered for defendants, and plaintiff appealed.

The opinion of his honor, Judge McCray, the Circuit Judge before whom the cause was tried, in which his honor the District Judge concurred, so clearly presents the point in controversy in this case and so fully argues it that we will present it here as follows:

"The land in controversy is a part of what is known as the Hot Springs Reservation, in Garland county Arkansas. The facts as they are set forth in the bill, are substatially as follows:

About the year 1839 the complainant entered into the possession of said land. On the 21st of February, 1873, the complainant, through his trustee, made and executed a lease of the premises to Defendants Gibbon and Kirkpatrick. Said lease was declared to be for the purpose of a hotel, bath house, &c., and the lessees were to pay rent at the rate of $500 a year, and $1,500 a year for *water privileges.* The term was to be three years and three months, beginning on the 21st day of February, 1873, and it was provided that the improvements mentioned therein, to be erected by the lessess, were not to cost more than $12,000, and that at the end of the term the lessor should have a right to take said improvements by paying two-thirds of the first cost thereof, and should take the furniture in said hotel and bath house by paying its

actual value, so that the sum should not exceed $8,000. Said lease also contained the following provision:

"The said Gibbon and Kirkpatrick, parties of the second part, hereby agree with Rector, party of the first part, that upon the termination of this lease, upon the terms hereinbefore specified and set forth, they will deliver to said Rector, party of the first part, or to his successors in office, or grantees, or to whomsoever at that time in law may have the right to control said trust property, all the lands that are hereinbefore leased or demised to the parties of the second part by said party of the first, promptly, without failure, and free from let or hindrance of any kind whatever, together with all the buildings, out-houses and improvements that may be erected on said premises."

Before said lease was executed the plaintiff had made certain improvements of the value of $1,000. After said lease was made a hotel was built on the premises, and a short time before the expiration of said lease the same was, by agreement, extended until some time in the future, when it might be terminated by further notice.

In 1877 the lessees sold and transferred to David Ballentine all their right and claim to said premises. While the original lessees were still in possession, plaintiff gave them the required notice to terminate the lease and requested them to furnish a list of the furniture coming within its provisions, which they failed to do, so that no settlement was ever made. The bill also alleges the death of David Ballentine, and makes his Administrators and heirs parties defendants.

Soon after the passage of the act of Congress entitled "An act in relation to the Hot Springs Reservation in the State of Arkansas," approved March 3, 1877, and the appointment of the Commissioners therein provided for, they caused the survey of the above mentioned leased lands, and a map of the same was made designating the premises as certain lots in block 89 in the town of Hot Springs.

It appearing that said hotel and certain other improvements were in the streets, they were by the Commissioners condemned, and were torn down and destroyed. In less than six months after the first sitting of said Board of Commissioners the plaintiff filed his claim before them to purchase said lots; and the heirs of said David Ballentine filed a like claim, and on a hearing of these matters before said Commissioners they awarded the right to purchase said lots to said heirs, although, as the bill alleges, it was fully shown to them that the said David Ballentine, their ancestor, had acquired his possession thereof in no other way than by said *lease made by the plaintiff to said* Gibbon et al.

It is *therefore* averred that the respondents should be held to hold said lots as Trustees for the use of complainant, who offers to pay any sum that may be found to be due the defendants, or either of them, by reason of any money they may pay out for the purchase of said lands.

The prayer is for an accounting, and that respondents be caused to hold the land as Trustees for complainant and required to convey the same to him and for general relief." Commenting upon these facts His Honor, Judge McCrary, in the Court

below, said: "Two questions have been discussed by counsel in this case to-wit:

1. Whether the decision of the Commissioners appointed under the provisions of the act of Congress of March 3rd, 1877, entitled "an act in relation to the the Hot Springs Reservation in Arkansas," upon questions of law and fact submitted to them, in accordance with the terms of the act, is in the nature of a final adjudication and conclusive upon the parties.

2. Whether, assuming that this Court may pass upon the correctness of the decisions of that Commission, the same ought, upon the merits, to be declared erroneous and set aside."

In considering the first of these questions it is necessary to determine from an examination of the act of Congress the nature of the duties and the extent of the powers of the Commission. We shall be guided in our inqniry by a glance at the history of the Hot Springs Reservation and of the legislation and litigation concerning the title thereto. For nearly a half century the title to this reservation has been in controversy. It was reserved from sale under an act of Congress approved April 20, 1832, (4 Stat., 505), and, until the passage of said act of March 3d, 1877, no law has subjected it to sale, pre-emption or location.

Certain persons, and among them complainant, claimed title to portions of the reservation. The complainant claimed title under "an act for the relief of the inhabitants of the late county of New Madrid, in Missouri Territory, who suffered by earthquake," approved February 17, 1815, (3 Stat., 211),

and other claimants claimed under pre-emptions. In order to settle the controversy which existed, and special reference to the settlement of the claims made under the said "New Madrid grant" and pre-emption laws, Congress passed the act of May 31st, 1870, entitled "an act in relation to the Hot Springs Reservation, in Arkansas," (16 Stat., 149). That act authorized any person claiming title, either legal or equitable, to the whole or any part of the reservation, to institute suit against the United States in the Court of Claims within ninety days from the passage of the act. The proceedings were to be by petition in the nature of a bill in equity, and provision was made for a final adjudication upon the conflicting claims of all parties, as well as between each of them and the United States. The fifth section provided that, in the event of a final decision in favor of the United States, the Court "shall order such lands into the possession of a Receiver, to be appointed by the Court, who shall take charge of, rent out, the same for the United States, until Congress shall by law direct how the same shall be disposed of." Under this act the complainant, Rector, brought suit, in the Court of Claims, to recover the land now in controversy.

The decree, of the Court of Claims, was in favor of the United States and adverse to the complainant.

Upon appeal to the Supreme Court, the decree of the Court of Claims was affirmed, the Supreme Court declaring that none of the complainants were entitled to the lands in question, (92 U. S. 694). In the opinion, the claim of the complainant, Henry

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M. Rector, is fully considered and held to be entenable.

It was, however, suggested that Congress would doubtless take into consideration any hardship that might issue from the decision, when dealing with the subject of the future disposition of the lands. Such was the situation when the act of March 3d, 1877, was passed, that act dealt with the Hot Springs reservation as a part of the public lands of the United States, but at the same time it provided, as we shall see, for ascertaining and protecting the rights of occupants and claimants with respect to improvements. The act provides for the appointment by the President of three discreet, competent and disinterested persons, who shall constitute a board of commissioners, with authority to perform and discharge the duties specified by the act.

The Commissioners were required to take and subscribe the usual oath for civil officers; to sit at the Springs; to give notice of the meeting, and to organize by electing one of their number as chairman.

The fifth and sixth sections of said act are as follows:

SEC. 5. That it shall be the duty of said Commissioners to show by metes and bounds on the map, herein provided for, the parcels or tracts of land claimed by *reason of improvements made thereon*, or *occupied* by each and every such *claimant* and *occupant* on said reservation; to *hear any* and all proof offered by said claimants and occupants, and the United States in respect to said lands, and in respect to the improvements thereon, and to *finally determine the rights of each claimant and occupant* to

purchase the same, or any portion thereof, at the appraised value, which shall be fixed by said commissioners, provided, however, that such claimants and occupants shall file their claims under the provisions of this act before said commissioners within six calendar months after the first setting of the said Board of Commissioners, or their claims shall be forever barred, and no claim shall be considered which has accrued since the 24th day of April, eighteen hundred and seventy-six.

SEC. 6. The said Commissioners shall have *power* to *compel* the *attendance of witnesses* and the production of papers touching the *occupancy* or *improvements* of, or on, said lands, or any other *matter* in *anywise* belonging or appertaining either to the said land or the improvements thereon, shall have *power* to *examine under* oath *all witnesses*, that shall come before *them*, and all testimony shall be reduced to writing and preserved as hereinafter provided."

The act further requires the commissioners to file in the office of the Secretary of the Interior, their report, together with a map and snrvey, showing the boundary lines of each *claim*, and also showing the name of each claimant, of each lot or parcel of land, the appraised value thereof, etc., including all the evidence taken by them respecting the *claimant's possessory right of occupation* to any portion of the reservation, and their finding in each case. They were also to issue *certificates to each claimant*, setting forth the amount of land that the holder is entitled to purchase, and the valuation

fixed thereon. The eleventh section provides as follows:

SEC. 11. That any *claimant* or *occupant*, his heirs, or legal representatives, in whose favor said *commissioners have adjudicated, shall*, under such rules and regulations as the Secretary of the Interior may prescribe, have the *sole right* to *enter and pay* for, at the price fixed by said Commissioners, the amount of land the *commissioners* have *adjudged* that they were entitled to purchase at any time within twelve months, next, after the land officers give the public notice herein required.

Counsel for complaint have insisted in argument that the decision of the commissioners are of no higher character than those of the officers of the land department, which may be set aside by a Court of competent jurisdiction on the ground of fraud, mistake, or misconstruction of the law.

Moore vs. Robins, 96 U. S., 330.
Shipley vs. Cowan, 91 U. S., 330.
Johnson vs. Townsley, 13 Wallace, 73.

(This last case is by mistake cited in the transcript as in 13, U. S.)

But it is manifest that Congress intended to clothe this tribunal with extensive Judicial powers. There is a broad distinction between its functions and those of the officers of one branch of the executive department referred to. The usual powers of a Court of Justice were conferred upon the Commissioners. It was organized by electing a presiding officer and to give notice of its sessions. Parties claiming the right to purchase any portion of the lands were required to appear before it. It was

clothed with the power to compel the attendance of witnesses and administer oaths; and it was to "finally determined the right of each claimant or occupant to purchase the same (the land), or any portion thereof, at the appraised value."

It is not to be supposed that Congress created this Commission, clothed it with all these powers, merely for the purpose of enabling it to perform the ministerial functions usually devolving upon an officer of the land department.

The language of the act, and the surrounding history and circumstances, alike forbid such an interpretation. *It was time to have an end of controversy.* For half a century the Courts and Legislatures of State and Nation have been vexed with this dispute. The question of title had been finally settled. Congress resolved, through the Commissioners, to have a final settlement of all questions as to improvements and the right to purchase *the title.* And so it was provided that the Commission should "finally determine these questions." This language, when applied to a special tribunal, must be held to mean a final determination in the absolute sense, although *similar language*, if applied to officers of the land department, might be held to mean final only so far as a departmental action is concerned. The rule of law above stated, relied upon by counsel for complainant, therefore does not apply. The following rule does apply: When the law has confided to a special tribunal the authority to hear and determine certain matters, the decision of that tribunal within the scope of its authority is binding upon all parties.

Johnson vs. Townsly, 13 Wallace 83.
Lytle vs. Arkansas, 9 Howard 33.
Boutner vs. Ventress, 8 Martin.
L. A., N. S., p. 644., S. C., 20.
American Decisions, 266.

I am clearly of the opinion, that the proceedings before the Commissioners were in their nature *Judicial.* That its jurisdiction, though limited and special, was plenary with respect to the particular matters specified in the act, and that its decision upon those matters is an *adjudication* which cannot be attacked in the present proceeding.

This conclusion disposes of the demurrer independently of the question whether the Commission erred in its decision upon questions of law. I am, however, of the opinion that the Statute authorized the finding.

The Board evidently considered that no right to purchase could be based upon any claim of title to the lands on the part of any of the claimants, and this, for the reason that such claim had been held to be unfounded by the Supreme Court of the United States.

They were bound to assume that complainant had no title to the land whatever, legal or equitable, and that therefore he could make no valid lease and confer no rights, upon the respondents in respect to the lands. They were, no doubt, of the opinion that the fact that certain persons had claimed the title, and had assumed to lease portions of the land to others, and to authorize the erection of improvements thereon, upon certain terms and conditions, could not be considered, after the decision of the Supreme Court against such claimants. Did the law require them to recog-

nize any claim based solely upon the fact that the complainant had assumed to be the landlord and had undertaken to lease the land?

I see nothing in the Statute that requires such recognition. The history of the controversy shows that certain persons, including the claimant in this case, made claim to the title, and that while making such claim they executed leases upon the premises. By a decision of the Supreme Court, their claim was found to be unfounded.

Their authority to lease did not exist. They and their supposed tenants were ejected by the true owner, the United States, but not until after they had for a long time enjoyed the rents and profits. When Congress came to dispose of the land and improvements, it did not see proper to make any special provision for these original claimants. If it had been intended to recognize any claim in them based upon or growing out of their unfounded claim of title, that *intention would have found expression in words.*

The claimants were well known; they had long been before Congress; these cases had just been decided by the Supreme Court, and it was that decision which led to the passage of the act of 1877, and yet they are not named in the act. It provides certain relief for "occupants" and claimants, and leaves the Commission to finally determine who are entitled to relief under this general designation. If the Commission held, as I suppose it did, that, under all the circumstances and in view of the terms of the act, persons who actually made improvements at their own expense were entitled to the right to purchase, without reference to the fact that some of them had entered under

leases given without authority by persons claiming, but not having, an interest in the land, I think the decision was within their discretion, and I see no reason to question its perfect propriety. Because certain persons had, without authority, gone upon the land, leased it out, received for a series of years rents to which they were not entitled, it certainly does not necessarily follow that they were entitled to the exclusive right to purchase at the sale. Of couse, if these original claimants had, themselves, expended money in making improvements they would have been entitled to consideration, but the fact that Rector assumed to own the land of the United States and to make a lease of it, conferred no right upon him and placed no restriction upon the right of the United States to dispose of the lands. Congress evidently intended to authorize the Commission to deal with the occupants and claimants upon the theory that no right had been acquired, under the leases executed by persons having no claim upon the land.

That those persons acted in good faith in making leases cannot alter the case. If they had in good faith made improvements the case would have been different; but the leases were, under the decision of the Supreme Court, clearly invalid. The United States was not bound to recognize them, and has not done so, the demurrer to the bill is sustained."

We might rest this case upon the clear and lucid exposition of the Court below, both upon the points of law, that the matter had become *res adjudicata* as upon the facts, that Rector was not in fact within the meaning of the law.

If the act of March 3d, 1877, did not create a tribunal with plenary powers over the subject matter of claims to pre-emption rights, it is because it did not have the power; for human language could not more strongly express it than is done in the act, (Sec. 19, statute at large, page 377), The power of Congress is not, and cannot be denied.

The 11th section of this act provides expressly that the person in whose favor the commission decided should have the "sole right of entry;" surely that did not mean that the entry should be in trust for some one else.

This Statute recognized no such relation. After the Commission had made its award, Congress by act approved June 10, 1880, approved the finding of the Commission. Sec. 21, Stat., page 288, 289. The first section of that act is in these words: "That any persons, his heirs or legal representatives, *in whose favor*, the Commission appointed under the acts of Congress of eighteen hundred and seventy-seven and eighteen hundred and seventy-eight, relative to the Hot Springs of Arkansas, have adjudicated, shall have the *sole right* to enter and pay for the amount of land the Commissioners may have adjudged him entitled to purchase, within eighteen months next after the expiration of the notice required by the tenth section of the act of Congress of March 3rd, 1877, &c." Now, although the main object and purpose of this act was to reduce the price and extend the time of entry, yet it, in effect, as completely ratified the action of the Commission as if it had provided that David Ballertine, or his heirs shall have the sole right, within eighteen months, &c., to enter this land in controversy, by paying forty per cent. of the appraised value,

&c. That act is a Congressional grant of the land, upon paying of the purchase money. It has often been decided by this Court that an act of Congress based upon the finding of a Commission, passes title. Strother vs. Lucas, 12 Peters Reports, pages 439, 440, as to the particular point, page 454; Curtis' Decisions, page 774, as to the particular point, page 786, in that case. There, land was claimed under a treaty, which this Court says is the "law of the land," and in that case hold that wherever one held land by right, equitable or legal, which bound the conscience of the King to make good even if inchoate, was protected by the provisions of the treaty of 1803, with France, which stipulated that the inhabitants of the ceded territory shall be maintained and protected in the free enjoyment of their liberty, *property*, and the religion they profess. See also 7 Peters 51; 9 Peters 168; Ib., 711; 10 Peters 336; 16 Peters 228; see also, 4 Howard 449. In case of Field vs. Seabury, it was held that when a grant or patent for land, or *legislative confirmation* of titles to land, has been given, by the sovreignty or legislative authority, without any provision having been made by the law, to enquire into its fairness, even where there is fraud, the question cannot be raised by a third party; and no one but the Government can file a bill to set aside the patent or grant. See the case 19 Howard, U. S. Rep., 324. Here the bill does not pretend that there is any fraud, and surely if he could not take advantage of such a confirmation, on the ground of fraud, he could not on the ground of mistake, or trust.

In that case the Court says: "A confirmation by law, is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*. 12 Peters, 454."

The following cases bear upon this point, also:

Glasgow vs. Hortiz, 1 Bl., 595.

As to the power of the Commission to make a final decision, outside of the clear and unequivocal language of the act of March 3rd, 1877, in addition to the unanswerable reasoning of the Court below, and the authorities cited, on the opinion, we cite the following cases, no one of which is as strong as this in its facts:

In Foly vs. Harrison, 15 Howard, page 445; Curtis' Dec., 589. By act 3 of August, 1846, Sec. 9 Statutes at large, 51, it was provided, "that the Commissioner of the general land office be, and he is hereby authorized and empowered to *determine*, upon principles of equity and justice, as recognized in Courts of Equity, used in accordance with general equitable rules and regulations, to be settled by the Secretary of the Treasury, the Attorney-General, and Commissioner, conjointly, consistently with such principles, all cases of suspended entries now existing in said land office, and to adjudge in what cases patents shall issue upon the same." Under this act the Commissioners reported ten entries by preemption, made at the land office of New Orleans, which had been before that suspended.

This report was agreed to by the acting Secretary of the Treasury and Attorney-General.

This Court, through Mr. Justice McClean, says of this:

"As this decision was made by a special tribunal *with full powers* to *examine* and *decide*, and as there was no provision for an appeal to any other jurisdiction, the decision is final within the law.

Now, if the Court will carefully examine that case and compare the act of Congress of 1846 with the

Hot Springs act of March 3d, 1877, it will be found that the power given the commissioners was much fuller, much more clearly judicial, and the provisions for the finality of their decisions much more clearly defined than was the provision of the act of 1846, giving the power to the commissioner of the general land office department.

If the plain language of the act of March 3d, 1877, needed construction, the clear exposition of Judge McCrary in the opinion on this case settles it. If that opinion needed any outside support, it is full in heaped measure in this case from 15 Howard. For in that case the last clause of the first section of the act of 1846 contains this provisio: "Provided, however, that such adjudication shall be made within two years from the passage of this act, and be first approved by the Secretary of the Treasury and Attorney-General, and shall *only operate* to divest the United States of the title of the land embraced by such entries, *without prejudice* to the *rights* of conflicting claimants." The old claimants of Hot Springs tried to get some such reservation into the act of 1877, by amendment, but it was rejected by the Senate for the very reason that the intention of the act to provide for a finality would be defeated thereby. A report made to the Senate by Senator Oglesby, we think it was, which will be found in the Congressional Globe of the session of 1876–1877, which was adopted, rejecting such amendments, for the reason that they tended to disturb the finality of the decisions of the Commission.

In the case cited there was an express reservation in the act of 1846, of rights of conflicting claimants, here there is not. Yet the Supreme Court say that

the decision in that case was *final* and related back to the original entries of the land, and carried the title of the United States *finally*, by the *decision*, to the entry which the Commissioners had sustained. So here the decision of the Commissioners was expressly to be final, not by implication, and did not reserve any rights of other claimants, whatever, for future consideration elsewhere. The land belonged to the United States. She chose her own mode of distributing her favors, and choseе a tribunal to act for her. That tribunal decided who was entitled to the pre-emption rights, and gave the title of the government. If, in the case cited, the action of a special tribunal was final (when by the act of 1846 the claims of others were not to be prejudiced), how much stronger is our case.

If in such case the title of the government passed without reservation of the rights of adverse claimants when the act provided that they should not be *prejudiced*, simply because there was no appeal or tribunal of review provided for by the act of 1846, does it not pass here as a finality when the act not only provides for no appeal or tribunal of review, but expressly clothes the special tribunal with plenary judicial powers over the subject, and provides for the finality of its decisions; and after the decision was made Congress ratifies it. In the case of Haydel vs. Dufresne, 17 Howard 23, this kind of a case is disclosed. The 5th section of the act of March 3d, 1811, (2 Statutes at Large, 663) provided, "that every person who, either by virtue of a French or Spanish grant, recognized by the laws of the United States, or under a claim, confirmed by the Commissioners appointed for the purpose of ascertaining the rights of persons claiming lands in the

Territory of Orleans, owns a tract bordering on any river, creek, bayou or water course, in said Territory, and not exceeding in depth forty arpens, French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to, and back of his own tract, at the same price and on the same terms and conditions as is or may be provided by law for the public lands in said Territory. And the principal deputy surveyor of each district, respectively, shall be, and he is hereby authorized, under the superintendence of the surveyor of the public lands of the State of Tennessee, to cause to be surveyed the tracts claimed by virtue of this section. And in all cases where, by reason of lands in the river, lake, creek, bayou, or water course bordering on the tract, and of adjacent claims of a *similar nature, each claimant cannot obtain* a tract equal in quantity to the adjacent tract already owned by him, to divide the vacant land applicable to that object *between the several claimants in such a manner as to him may appear most* equitable. Held that a division between the claimants of such back lands, made in good faith, by the principal deputy surveyor of the proper district, under the superintendence of the surveyor of public lands south of the State of Tennessee, was *final* and *conclusive* upon their respective rights, and cannot be disturbed by *any court of justice.*

As to this question of the decision of a commission inuring to the benefit of any holder of a secret equity or resulting trust, we refer to Strother vs. Lucas, 6 Peters, 763. In that case it was contended that as the commissioners had decided upon, and confirmed the title of the claimant, who had pe-

titioned it inured to the benefit of the rightful claimant.

Judge Thompson, in delivering the opinion of this Court, says: "This view of the case cannot be sustained;" Sec. 6 Peters, page 773, when, on a new ejectment suit brought by the same plaintiff under the law, as it then stood, which allowed successive actions of ejectment to be brought, on the new evidence of the customs and statute laws of Spain in reference to land titles and grants in the colonies. This Court reviewed the whole ground and decided the case by a a badly divided Court, Judge Catron, with his peculiar originality, concurring upon his own ground, there is no modification of this announcement; for the last case, Sec. 12 Peters above cited as to another point.

In Brown vs. Jackson 7, Wheaton 218, Curtis' decisions 252, there was a question akin to this came before this Court, under the act of 31 March, 1814. 3 statutes 116, and the supplemental act of 23 January, 1815, 3 statutes at large 192, and the further supplementary act of 3 of March, 1815, (3 statutes at large 235). Under the latter act, certain commissioners, who were appointed under the former acts, were authorized to admit and *finally settle* all such claims, "as have been, or may be," within the time limited, duly "released, assigned and transferred to the United States, but the President is authorized, from time to time, to cause to be issued such certificates of stock as are specified in the first act and supplement thereto, to such claimant or claimants, whose claim may be decided and reported by the commis-

sioners on receiving such report in relation to such claim from the commissioners."

The Commissioners had made an award and this Court, by Livingston, Judge, says:

"The Court is therefore of the opinion that this claim was clearly within the jurisdiction of the Commissioners, *and that their award* on the *subject is final and conclusive.*"

This case will be seen to apply directly here, when the Court examines the Statutes referred to, and sees, that the subject matter of the award involved matter of public lands, for which the Commissioners were authorized to examine the releases to the United States of the different and conflicting claimants, pass upon their validity, and award the money indemnity provided for, to the rightful claimants.

We will not multiply decisions upon this point.

It is well settled that when a new right, or means of acquiring it is conferred by a Constitution or Statute, and an adequate remedy is given by the same authority which created the right, parties are confined to the redress thus given. Baxter vs. Brooks 29 *Ark.*, 173. *The State* on *the relation* of *Gressell vs. Marlow*, 15 *Ohio St.*, 114; Smith vs. Lockwood, 13 *Barber*, 209; Dudley vs. Mahew, 3 Comst., 9; Sedge on Statutory and Const., Law, 94; Com. on relation of Attorney-General vs. Garrigues, 28 Penn., St., 9; Com. vs. Baxter, Id., 263; Com. vs. Leech, 44 Id., 332; *Pringle vs. Carter*, 1 *Hill* (S. C.), 53. Upon these points see also Morgan vs. Curtenius, 4 McLean, 366; Landers vs. Bryant, 10 Howard, 358; Higuersas vs. United States, 5 Wallace, 827; Lynch vs. Beruall, 9 Wallace 31.

Having, as we think, conclusively disposed of the case upon the law points arising on the demurrer upon the score of jurisdiction, let us see if the case made by the bill will permit the interposition of a Court of Equity. Fraud is not set up and there is no pretence that it existed, and, in view of the fact that the plaintiff here vigorously contested the claim before the Commissioners, and had it in his power to show it there, if it existed, he does not come within the rule laid down in U. S. vs. Throckmorton, 98, United States, 68, and United States vs. Flint, 4 Sawyers as to fraud. The statements of the old improvement, —the rock wall—to Hot Springs creek, goes for nothing, for first, the act of Congress does not contemplate turnpikes, waterways, culverts, and the like, only in so far as they may be appendant to an improvement accompanied with occupancy, a home for living, a house for business, a field or garden for cultivation, and the like, is clearly what was contemplated, and if the rock wall or piece of an old wall would be such an improvement as could support a claim, then the whole reservation might have been claimed under this pretence, for the creek runs entirely across the reservation from side to side; and a rock wall on the edge of the streets, if it was an improvement within the act (for an occupancy it certainly was not), then the plaintiff had as well filed his bill against all as well as nine or ten persons mentioned in this transcript. Again, Rector, when this possession was taken by Gibbon & Kirkpatrick, abandoned and surrendered this pretended improvement, with all that it implied, and he neither had a claim, by reason of improvement or occupancy prior to

24th of April, 1876. An abandoned improvment gives no preemption. Williams vs. McIvor, 24 Arkansas 33. Lastly, the facts were, as shown by the bill, fairly before the Commissioners and were heard and considered; and, upon the statements in the bill, no Court would reverse the award on appeal to a higher Court on motion for new trial, where a jury had found upon the facts of improvements as the commissioners had done, and can more be done in this case? Rector does not base his claim on this, but only on the trust supposed to result from the lease.

The next question is, was Rector the owner of the improvements of Gibbon & Co. He does not pretend to be that; he only *claims the right to purchase them* under *a contract of lease*, which was void, and was a usurpation. Whenever this Court decided the Hot Springs cases, on appeal from the Court of Claims, it was at once settled, that all the property included in Rector's New Madrid claim was government land. Held, not for sale or settlement, but specially reserved, by the act of 1832, and a lease on the Capitol grounds at Washington or the Arsenal grounds at Little Rock, similar to the one set up by Rector, would have been as valid. That decision brought this pretended lease within the rule settled by the Court for the Eastern District of Arkansas. *Dupas vs. Wassell*, 1 *Dillon*, 213. We call attention to the clause in the lease, in which Rector warrants quiet enjoyment against every one but the United States. Here is the fly in his ointment, for that very clause left the tenant at liberty to protect himself by attorning to the Receiver, after the decision in 1876. This lease, on its face, was to run three years and three months, as stated in the bill. This

time had about expired when the Receiver was appointed, so that Rector had no right outside of law, by contract, (as duty to protect on the part of the landlord, is commensurate with fealty on the part of the tenant); so that in law and in fact, the tenant was at liberty to attorn to the Receiver, and did so; had to do so. Outside of what the bill states the Court will recognize Statutes and public history sufficiently to know judicially that a Receiver was appointed a year or so before the act of 1877 was passed. The law presumes that as a public officer he did his duty and took possession and collected rents; in point of fact he did, and the bill sufficiently shows it, besides the bill expressly states that the Receiver took possession. He had not made the improvements. He had not paid another for them, and had no legal right to do so without consent, and after the appointment of the Receiver in 1876, (see act of 3 March, 1877). The 5th section of this act prohibits any claim which accrued subsequent to April 24, 1876, the date of appointment of Receiver. Now this pretended lease, by its terms, did not expire until the 21st day of May, 1876, as stated in the bill, see transcript, page 3. Therefore, as there could be no purchase until the lease ended. Rector could not have become the owner of the improvements until after the 24th of April, 1876.

Therefore, he could not have had a claim, by occupancy or improvement, which was not subsequent to the 24 April, 1876.

The act directs the bounty to be awarded to claimants by reason of occupancy or improvements, the right was personal, not vicarious. Rector neither oc-

cupied, nor did he own the substantial improvements, by having made them, caused them to be made, or paid for them. His claim to the right to pay for them since the award, under a void contract, is futile.

The buildings and improvements, though put upon the land of another, by his permission, belonged to the builder, Rector vs. Gaines, 19 Ark., 71; 93 United States 3; 1 Washburn on Real property, page 3, section 4; Aldrich vs. Parsons, 6 N. H. 555; Osgood vs. Howard, 6 Greenleaf, 462; Russell vs. Richards, 1 Fairf, 429; Ashman vs. Williams, 8 Pick., 402; Doty v. Gorham, 5 Pick, 487; Dame vs. Dame, 38 N. H., 429–431; Mott vs. Palmer, 1 Comst. 571; Rogers vs Woodbury, 15 Pick., 156.

Even if Rector had color of title at the time the pretended lease was made, still the judgment of ouster avoided all that. If a landlord has been divested of a title under which a tenant enters, the tenant is not estopped to attorn to a better title, and set it up in defence after acquiring it; *Bettison vs. Budd*, 17 Arkansas, 546.

The appellant in this case, and the other original claimants to the springs, received the lions share of this bounty, under the awards of the Commissioners, and for many years enjoyed the rents and profits of a large part of the property, including a monopoly of the water, to which they really had no rights. The Government has claimed no back rents, which might well have been done. No hardship has been visited upon them, and no injustice will be done by leaving the whole matter where Congress left it, to the award of the Commissioners, and not by an unfortunate ruling of the Courts encourage these parties to threaten

the titles of the few poor people, to whom the Commissioners have awarded an humble home, for of all the cases mentioned in the transcript, this case and one other, is all in which the value of the property would be sufficient in amount to authorize an appeal, $5,000.

We respectfully submit that the decision of the Court below is in strict accordance with the uniform rulings of this Court in like cases, and is clearly the correct construction of the act of Congress of 1877.

CLARK & WILLIAMS,
For Appellees.